W.D.D.W. Commercial Systems & Investments, Inc. d/b/a Aztech Electric Company; Contractors Labor Pool, Inc. *and* International Brotherhood of Electrical Workers, Local Union 441, AFL–CIO

Fuji Electric Corp. and Contractors Labor Pool, Inc. *and* International Brotherhood of Electrical Workers, Local Union 441, AFL–CIO

Contractors Labor Pool, Inc. *and* International Brotherhood of Electrical Workers, Local Union 441, AFL–CIO

Contractors Labor Pool, Inc. *and* International Brotherhood of Electrical Workers, Local Union 191, AFL–CIO *and* International Brotherhood of Electrical Workers, Local Union No. 46, AFL–CIO *and* Washington State Association of Plumbers and Steamfitters, United Association of Journeymen and Apprentices of The Plumbing and Pipefitters Industry, AFL–CIO *and* Washington and Northern Idaho District Council of Laborers, Laborers' International Union, AFL–CIO *and* Plumbers and Pipefitters Local Unions Nos. 32 and 82, United Association of Journeymen and Apprentices of The Plumbing and Pipefitters Industry, AFL–CIO *and* International Brotherhood of Electrical Workers, Local Union No. 332, AFL–CIO *and* International Brotherhood of Electrical Workers, Local Union No. 302, AFL–CIO *and* International Brotherhood of Electrical Workers, Local Union No. 617, AFL–CIO. Cases 21–CA–29201, 21–CA–29770, 21–CA–30409, 21–CA–30466, 21–CA–30702, 21–CA–31288, 21–CA–31326 (formerly Case 19–CA–23957), 21–CA–31327 (formerly Case 19–CA–24117), 21–CA–31453 (formerly Case 19–CA–24592), 21–CA–31328 (formerly Case 19–CA–23962), 21–CA–31329 (formerly Case 19–CA–24421), 21–CA–31330 (formerly Case 19–CA–24441), 21–CA–31331 (formerly Case 19–CA–24461), 21–CA–31395–1 (formerly Case 32–CA–15350), 21–CA–31395–2 (formerly Case 32–CA–15367), 21–CA–31454 (formerly Case 19–CA–24573), 21–CA–31477 (formerly Case 20–CA–27090), 21–CA–31478 (formerly Case 20–CA–27166), 21–CA–31479 (formerly Case 20–CA–27195), and 21–CA–31480 (formerly Case 20–CA–27214)

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On September 3, 1997, Administrative Law Judge Gerald A. Wacknov issued the attached decision. Respondent Contractors Labor Pool, Inc. (Respondent CLP), the General Counsel, and the Charging Party, International Brotherhood of Electrical Workers Local Union 441, AFL–CIO (IBEW Local 441), each filed exceptions and supporting briefs. The General Counsel filed an answering brief to Respondent CLP's exceptions. Several Seattle area Charging Parties also collectively filed a response to Respondent CLP's exceptions.[1] International Brotherhood of Electrical Workers, AFL–CIO filed a brief as amicus curiae. Respondent CLP filed an answering brief to the amicus brief, and a reply brief to the Seattle Charging Parties' response.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

This is a "salting" case[4] involving the activities of members and agents from three West Coast IBEW Locals directed towards three Respondent Employers: CLP, a nonunion construction employee leasing company, and two of its nonunion construction contractor clients, Aztech Electric Company (Aztech) and Fuji Electric Corp. (Fuji). The 8(a)(3) and (1) complaint includes several allegations of specific discrimination against individual "salts," but the primary focus here is on two subjects: (1)

[1] This brief was submitted on behalf of IBEW Locals 46 and 191, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 32 and 82 (Plumbers Locals 32 and 82), and the Washington State Association of Plumbers and Steamfitters.

[2] We deny the Respondents' motion to reopen the record to include evidence of California State criminal code and civil court proceedings against certain agents of IBEW Local 441.

[3] The parties have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] "'Salting a job' is the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees. A 'salted' member or 'salt' is a union member who obtains employment with an unorganized employer at the behest of his or her union so as to advance the union's interests there." *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993) (judge's decision).

Respondent CLP's "30-percent rule," a policy of not hiring or considering any applicant whose recent wage history differs by 30 percent from CLP's starting wages, and (2) CLP's defense that paid union organizers are not employees within the meaning of Section 2(3) of the Act because the salting tactics of their unions created a "disabling conflict"[5] with CLP.

The judge has dismissed all allegations of discrimination by Fuji and Aztech, and we affirm his findings and conclusions in this regard.[6] With respect to CLP, the judge found that its 30-percent rule was inherently destructive under a *Great Dane Trailers*'[7] analysis, and therefore unlawful, because it effectively excluded from eligibility for hire virtually all applicants who had recently worked for unionized employers. For the reasons discussed in section II below, we agree with the judge.

Although the judge's finding would ordinarily have lead to a further finding that the Respondent violated Section 8(a)(3) by relying on the 30-percent rule when failing to hire or consider for hire several named discriminatees, as well as an entire class of similarly situated discriminatees, he found merit in CLP's "disabling conflict" defense with respect to IBEW Local 441's salting campaign. The judge found that this Union's campaign had an objective of eliminating nonunion employers' operations, rather than organizing their employees, within its jurisdiction. He concluded that paid union organizers of a union pursuing such an objective were not statutory employees. He further suggested that Respondent CLP might be entitled to presume that any applicant from Local 441 was a paid union organizer, so that the General Counsel would bear the burden in compliance proceedings of proving which victims of the unlawful 30-percent rule were not paid union organizers.[8] For the reasons discussed in section III below, we disagree with the judge not only as to the legal consequences of a disabling conflict, when proven, but also as to the merits of Respondent CLP's reliance on this defense with respect to the unfair labor practice allegations at issue here.

II. CLP'S 30-PERCENT RULE

Respondent CLP is a major supplier of construction trade labor to nonunion contractors in the western United States. At times relevant to this proceeding, CLP hired as many as several thousand employees annually. On November 8, 1994, CLP implemented a new hiring guideline stating that: "Applicants whose most recent year of work experience is at a pay level more than 30% higher or lower than the starting wages paid on CLP assignments are not likely to be retained in the pool, and must not be hired."

The new 30-percent rule was based on a study of worker retention undertaken by CLP Chairman Michael McCune. Operating from the generally accepted notion that workers who had previously earned higher wages would be less likely to continue to work for CLP, McCune sought to identify a wage differential breakpoint that would improve CLP's traditionally low employee retention rate.[9] His study led to the conclusion that 30 percent was the breakpoint.

It is undisputed that the implementation of the 30-percent rule had the effect of excluding from eligibility for hire virtually all West Coast electrician applicants who had worked for any significant period of the preceding year on a construction project where their wages were determined by a union-negotiated contract. Indeed, the applications from five of the specifically named discriminatees in this case,[10] as well as hundreds of other applications filed during the relevant time period, were rejected for this reason.

The judge found, and we agree, that CLP articulated a legitimate business justification for adopting the 30-percent rule and was not motivated by union animus.[11] He nevertheless concluded that the rule was unlawfully discriminatory because of its inherently destructive effects on employees' Section 7 rights. For the reasons set forth in the judge's decision, as further explained below, we affirm the judge's conclusion that the 30-percent rule violates Section 8(a)(3) in the circumstances of this case.

It is not per se unlawful for an employer to refuse employment to individuals who would be taking a substantial pay cut from their historical wage levels.[12] Prior Board cases involving allegations that wage comparability hiring rules are unlawful have focused on whether

[5] *Sunland Construction Co.*, 309 NLRB 1224, 1230–1231 (1992).

[6] We therefore need not pass on the General Counsel's exceptions to the judge's failure to find that both CLP and Aztech and CLP and Fuji were joint employers of employees referred by CLP to the contractors' jobsites.

[7] *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967).

[8] Although expressing doubts about certain aspects of the other two IBEW Locals' salting campaigns, the judge found that their activities did not create the same "disabling conflict."

[9] As noted by the judge, CLP uses the term "retention" to refer to a pool of construction employees who work for it on a recurring basis over a given span of time.

[10] John Hasenaur, Thomas Balik, Michael Gillespie, Diego Duran, and Paul Becker.

[11] We affirm the judge's findings that the Respondent relied on other legitimate disqualifying reasons and did not violate Sec. 8(a)(3) by failing to hire or refer alleged discriminatees Paul Yontz, David Barber, Michael Kaspar, Vincent Cameron, Mike Inouye, David Lawhorn, Claude Johnson, Howard Holman, and Marlyn Haase.

[12] See, e.g., *Kelly Construction of Indiana,* 333 NLRB 1272 (2001); *Micrometl Corp.*, 333 NLRB 1133 (2001); *J. O. Mory, Inc.*, 326 NLRB 604 (1998); and *Wireways, Inc.*, 309 NLRB 245, 252–253 (1992).

there was specific evidence of an intent to discriminate in the promulgation or application of a rule.[13] Here, however, we address for the first time an allegation that a rule is unlawful, even in the absence of evidence of antiunion motivation, because it is inherently destructive of Section 7 rights.

It is well established that certain conduct is so inherently discriminatory and destructive of Section 7 rights that proof of antiunion motivation is unnecessary. In such a case, the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963). In *NLRB v. Great Dane Trailers*, 388 U.S. at 34, the Supreme Court articulated a framework for the analysis of such conduct:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

"Inherently destructive" conduct under the *Great Dane* standard includes conduct that creates "visible and continuing obstacles to the future exercise of employee rights." *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 359 (5th Cir. 1981) (en banc).[14] We find that the Respondent's 30-percent rule falls within this category. A hiring standard that operates to disqualify automatically virtually all applicants who have recently earned union contract wages directly penalizes those who have exercised their protected right to work in an organized work force and imposes a formidable threshold barrier to protected organizational activity in the unorganized work forces of CLP and its contractor clients. By itself, the blanket denial of job opportunities for those who have had union representation on recent jobs, and in many cases have themselves become union members, necessarily discourages union membership. The 30-percent rule therefore has at least the same degree of overt, pervasive, and severe impact on employee rights as other employer policies previously deemed inherently destructive of employee rights. E.g., *Honeywell, Inc.*, 318 NLRB 637 (1995). The impact is even worse when coupled with the serious effect of the rule on the organizational rights of the employees of CLP and its contractor clients. As stated long ago by the Supreme Court:

> Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.[15]

We find no merit in the arguments by CLP and the dissent that *Great Dane* and the "inherently destructive" analysis do not apply here because the 30-percent rule nominally discriminates on economic grounds, rather than expressly along Section 7 lines. Section 8(a)(3) itself literally applies to any "discrimination in regard to hire."[16] Thus, even conduct that does not divide the work force based on participation in protected activities may be unlawful if it is inherently destructive of employee rights under the Act. See *Lone Star Industries*, 279 NLRB 550, 552–553 (1986) (a facially neutral policy may be unlawful under *Great Dane* where, in practice, it has "the predictable and actual effect" of penalizing union supporters), enfd. mem. in pertinent part sub nom. *Teamsters Locals 822 and 592 v. NLRB*, 813 F.2d 472 (D.C. Cir. 1987); see also *Greyhound Lines*, 319 NLRB 554, 572 fn. 15 (1995).

In this sense, the Board's inherently destructive theory is analogous to the disparate impact theory long applied in cases prosecuted under Title VII of the Civil Rights Act of 1964. Under that theory, facially neutral employment policies that are "fair in form," i.e., they apply equally to blacks and whites or to women and men, nonetheless may be deemed unlawful if they are "discriminatory in opera-

[13] Compare, e.g., *Donald A. Pusey, Inc.*, 327 NLRB 140 (1998) (violation found where rule was a pretext to avoid hiring applicant because of his union affiliation), with *J. O. Mory*, supra (no violation absent proof of disparate treatment or pretext in application of legitimate hiring policy).

[14] For a general summary of the guiding principles for determining whether inherently destructive conduct has occurred, see *International Paper Co.*, 319 NLRB 1253, 1269–1270 (1995).

[15] *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 185 (1941).

[16] Such discrimination of course, violates the Act only if intended "to encourage or discourage" union membership.

tion." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (disparate impact on women of uniformly applied height and weight restrictions established a prima facie case of discrimination). If such a policy is discriminatory in operation, it becomes the employer's burden to justify adherence to the policy to forestall a finding that the policy was implemented and used "merely as a 'pretext' for discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

Moreover, we find no merit in the argument that Respondent CLP cannot be held to intend discrimination against union activity because the 30-percent rule also excludes from hiring eligibility other applicants whose wage history has no connection with union representation or membership. Cf. *Lone Star Industries*, supra at 552 fn. 7 (facially neutral alteration of work assignment policy that overwhelmingly impacted employees who supported strike was not saved by evidence that it also impacted some employees who refrained from union activity). The fact that the rule impacts others in no way mitigates its obvious and profound discriminatory effect on the class of individuals whose rights are protected by the Act. The rule still operates to exclude virtually *all* applicants with a recent union wage history while excluding only *some* applicants with a recent nonunion wage history. Stated differently, the only real way to gain entry to CLP's work force is through prior employment with other nonunion employers.[17]

Turning to the next step in the *Great Dane* analysis, we consider the Respondent's justification for adopting the 30-percent rule. As a general matter, we can easily agree that an employer has, as a managerial prerogative,[18] a substantial and legitimate business interest in devising hiring rules that would reasonably assure greater employee retention. In this particular case, we find that Respondent CLP has proved that the 30-percent rule reasonably served this interest. Not only did the rule foreseeably have the effect of improving employee retention rates, but the record also shows a positive correlation between length of employee tenure, job safety, and customer satisfaction.

Having found that the 30-percent rule was inherently destructive and that Respondent CLP proved a substantial and legitimate business justification for adoption of the rule, our remaining task is to balance the conflicting interests to determine whether the Employer's business purpose is sufficient to outweigh the destructive impact on employee rights.[19] We find that it is not. Viewing Respondent CLP's evidence in the light most favorable to it, we find that the 30-percent rule provided only some incremental benefit to CLP's work force retention rate and operational efficiency. We agree with the judge's observation that the rule was "not essential to the successful operation of CLP's business, as the record shows that CLP has operated competitively and has grown considerably in a relatively brief period of time, and that it has enjoyed such growth prior to the enactment of the rule." On the other hand, the destructive impact of the 30-percent rule on employees' statutory rights is direct, broad, severe, and enduring. Maintenance of the rule presents a continuing impediment to the core right of self-organization and a continuing discriminatory penalty to those who choose to work for a unionized employer. Under these circumstances, we conclude that the 30-percent rule violates Section 8(a)(3) and (1) of the Act and must be rescinded.[20]

III. CLP'S "DISABLING CONFLICT" DEFENSE

In about 1991, IBEW Local 441 targeted Respondent CLP as part of an aggressive salting campaign against nonunion employers operating within its jurisdiction. Union officials, including some of the alleged discriminatees in this case, directed the ensuing campaign that was still ongoing at the conclusion of the unfair labor practice hearing in this case. This direction included granting union members permission to apply for work with a nonunion employer, providing specific guidelines on how to apply and what activities to engage in if hired, and authorizing payment to some "salts" for their work.

Part of Local 441's campaign included typical efforts to infiltrate and proselytize the Employer's work force.

[17] Furthermore, it is no defense that a few union members may have passed the Respondent CLP's 30-percent rule. Cf. *Connecticut v. Teal*, 457 U.S. 440, 455–456 (1982) (rejecting theory that a criteria discriminatory in operation cannot be unlawful where some protected class members pass it).

[18] Legitimate business justifications tend to fall within one of three categories: (1) justification based on managerial prerogative; (2) justification based on the employer's desire to gain or enhance its bargaining leverage; and (3) justification based on the effectuation of statutory policy. The majority of cases fall within the first category.

Managerial prerogative refers to that authority which an employer needs to possess in order to successfully manage and operate its businesses.

Frick, *Inherently Discriminatory Conduct Revisited: Do We Know It When We See It?*, 8 Hofstra Labor L.J. 275, 315 (1991).

[19] "[E]ven if an employer comes forward with a nondiscriminatory explanation for its actions, the Board 'may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 701 (1983) (quoting *Great Dane Trailers*, 388 U.S. at 33–34).

[20] We emphasize that our conclusion is limited to the facts of this case and that we do not pass on the legality of other wage comparability rules that may have a lesser exclusionary effect or that may be more narrowly drawn and essential to an employer's business operation.

The more controversial aspects of the campaign involved efforts to challenge the practices of the targeted Employers and to increase significantly their operating expenses.

According to the testimony of CLP Chairman McCune, CLP became aware of Local 441's salting activities in February 1993, when unfair labor practice charges against Aztech Electric were filed. Thereafter, as stated by the judge, "CLP has become well acquainted with such salting activities, and has developed standardized safeguards and a staff training program purposefully designed to deal with such matters in a lawful way, and to keep CLP 'out of trouble.'" In May and June 1995, CLP distributed literature to its clients with advice on how to deal with union organizing campaigns. A booklet distributed on the latter date was entitled "Guidelines on Reducing NLRB Related Problems." It specifically referred to the "IBEW Local 441 Salter Campaign" and the Union's alleged purpose of generating unfair labor practice charges "to tie-up a contractor in expensive legal proceedings." On October 31, 1995, about a month and a half after the commencement of the lengthy hearing in this case, McCune presented testimony before a Congressional subcommittee in which he denounced Local 441's salting tactics. McCune stated, inter alia, that "We are not targeted for union organization, as would be expected. Rather, we are targeted for extinction. Instead of organizing, the union 'salting' campaign is intended to increase our cost of operation and to destroy our customer relationships."[21]

In *Sunland Construction Co.*,[22] the Board held that proof of a "disabling conflict" between a union and employer in an economic strike situation privileged the employer's refusal to hire a paid union organizer and known agent of the union during the strike. Respondent CLP here has contended that a similar "disabling conflict" existed at all relevant times between it and IBEW Local 441 because that Union's salting campaign focused on attempts to put CLP and other nonunion employers out of business, or at least to force them to cease operations within the Union's jurisdiction, rather than on genuine efforts to organize the employees of those employers.

The judge agreed with Respondent CLP that Local 441's salting objectives and tactics created a disabling conflict. Based on this finding, he concluded that Local 441's paid union organizers were not employees within the meaning of Section 2(3) of the Act. He also found that CLP's failure to refer paid union organizers Vaughn Hedges and Shawn Smith to jobs after their November 1994 layoff by Aztech was not unlawful, even though he found that it would have violated Section 8(a)(3) if they had been statutory employees. For the same reason, he found no 8(a)(1) violation for the statement by a CLP manager to Hedges that union literature was not permitted on CLP jobs. Finally, in defining a remedy for Respondent CLP's unlawful rejection of job applications pursuant to its 30-percent rule, the judge reserved for compliance the issue whether CLP should be entitled to exclude automatically all Local 441 members from consideration for employment because any one of them could be a paid union organizer.

At the outset, even assuming, arguendo, that a "disabling conflict" existed between Local 441 and CLP, we must reject the judge's conclusion that IBEW Local 441's paid union organizers did not have employee status within the meaning of Section 2(3) of the Act. In *Sunland Construction,* supra, and *Town & Country Electric*, 309 NLRB 1250 (1992), the Board reaffirmed its longstanding view that paid union organizers have statutory employee status when working for, or applying to work for,[23] an employer subject to the Board's jurisdiction. In *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), the Supreme Court approved the Board's position. In doing so, it expressly rejected the argument that statutory status should be denied to paid union organizers because

> "salts" might try to harm the company, perhaps quitting when the company needs them, perhaps disparaging the company to others, perhaps even sabotaging the firm or its products. . . .
>
> This practical argument suffers from several serious problems. For one thing, nothing in this record suggests that such acts of disloyalty were present, in kind or degree, to the point where the company might lose control over the worker's normal workplace tasks. Certainly the Union's resolution contains nothing that suggests, requires, encourages, or condones impermissible or unlawful activity. . . . For another thing, the argument proves too much. If a paid union organizer might quit, leaving a company employer in the lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants to move elsewhere. And if an overly zealous union organizer might hurt the company through unlawful acts, so might another unpaid zealot (who may know less about the law), or a dissatisfied worker (who may lack an outlet for his or

[21] Testimony of Michael McCune to the Oversight and Investigations Subcommittee of the Economic and Educational Opportunities Committee, U.S. House of Representatives, Oct. 31, 1995, 1985 WL 11597719.

[22] 309 NLRB 1224, 1230–1231 (1992).

[23] The statutory word "employee" includes job applicants. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 185–186.

her grievances). This does not mean they are not "employees."

Further, the law offers alternative remedies for Town & Country's concerns, short of excluding paid or unpaid union organizers from all protection under the Act. For example, a company disturbed by legal but undesirable activity, such as quitting without notice, can offer its employees fixed-term contracts, rather than hiring them "at will" as in the case before us; or it can negotiate with its workers for a notice period. A company faced with unlawful (or possibly unlawful) activity can discipline or dismiss the worker, file a complaint with the Board, or notify law enforcement authorities. See, e.g., *NLRB v. Electrical Workers*, 346 U.S. 464, 472–478 (1953); *Willmar Elec. Service v. NLRB*, 968 F.2d at 1330 (arsonist who is also union member is still an "employee," but may be discharged).[24]

Based on the foregoing, we must hold that paid union organizers for IBEW Local 441 were statutory employees when applying to work for, and working for, Respondent CLP.

Furthermore, we need not decide whether certain aspects of that Union's salting campaign, as promulgated and effectuated by its paid agents, created a disabling conflict comparable to the one found in *Sunland,* supra.[25] Respondent CLP's invocation of the disabling conflict issue is limited to the erroneous legal argument that paid agents of a union enmeshed in such a conflict are not statutory employees and therefore are not entitled to the Act's protection, regardless of the reasons relied on by Respondent CLP when taking the alleged discriminatory actions. Contrary to Respondent CLP's statutory exemption argument, the disabling conflict defense is effectively a *Wright Line* defense.[26] Therefore, Respondent CLP must prove not only that a disabling conflict existed, but also that it actually did rely on this conflict with respect to the alleged discriminatory actions in this case. Contrary to the judge's suggestion that Respondent CLP should be entitled to presume that any applicant or current employee from IBEW Local 441 was a paid union organizer, we hold that Respondent CLP also bears the defense burden of proving that it knew of an applicant's status as a paid union organizer and denied employment because of IBEW Local 441's strategy.[27]

Respondent CLP has not attempted such proof in this case. Although the record shows that CLP was aware of IBEW Local 441's salting campaign and tactics long before the conclusion of the hearing in this case on November 8, 1996, it has instead contended throughout this proceeding, with record support, that it failed to consider for hire, failed to hire, or failed to retain alleged discriminatees for other reasons, most notably, the 30-percent rule.

As previously stated, we affirm the judge's finding that Respondent CLP violated Section 8(a)(3) and (1) of the Act by refusing to consider applicants who failed to meet the wage requirements of its 30-percent rule. There is no claim or evidence that Respondent CLP also relied on any disqualified applicant's status as a paid agent of a union with which CLP had a disabling conflict. With respect to employees Shawn Smith and Vaughn Hedges, whom the judge found Respondent CLP refused to refer to new jobs because of their union activities, there is no claim or evidence that Respondent CLP acted on the knowledge or belief that either discriminatee was a paid "salt." We, therefore, find that Respondent CLP violated Section 8(a)(3) and (1) of the Act by failing to refer either Smith or Hedges to jobs after November 25, 1992.[28]

AMENDED REMEDY

Having found that Respondent CLP unlawfully failed to refer Shawn Smith and Vaughn Hedges to jobs, Respondent CLP shall be required to offer them immediate reinstatement and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent CLP shall also be required to remove from its files any and all references to the unlawful failure to refer Smith and Hedges, and to notify them that this has been done.

As a remedy for the unlawful 30-percent rule, the judge recommended rescinding the rule, requiring Re-

[24] 516 U.S. at 96–97.

[25] Although Chairman Hurtgen and Member Truesdale agree that proof of a disabling conflict is not dispositive of the unfair labor practice issues here, they write separately to express their opinion that there was a disabling conflict. Members Liebman and Walsh write separately to express their opinion that there was no disabling conflict. Members Liebman and Walsh write separately to express their opposite view on the existence of such a conflict.

[26] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

[27] Compare, *Brown & Root USA, Inc.*, 319 NLRB 1009 (1995), where the Board rejected the respondent's legal claim that applicants' declaration of volunteer union organizer status disqualified them for hire and found that the respondent had failed to prove that it relied on any of the applicants' allegedly disqualifying individual picketing-related conduct when refusing to hire them.

[28] We further find that Respondent CLP's manager, Nezrab, violated Sec. 8(a)(1) by telling Hedges that he could not distribute union literature on CLP jobs.

spondent CLP to reevaluate those union applicants who have been disqualified on the basis of the rule, and providing backpay, with interest, to those applicants who would otherwise have been hired and referred to jobs. We shall adopt the recommended rescission remedy, and we shall add a requirement that Respondent CLP remove from its records any reference to the failure to consider or hire applicants based on its 30-percent rule. With respect to the judge's other remedial recommendations, we note that in *FES*, 331 NLRB 9 (2000), issued subsequent to the judge's decision here, the Board set forth a new framework for analysis of refusal-to-hire and refusal-to-consider violations. Not only does the violation at issue here present elements of both types of violations, it also involves numerous hiring centers with varying needs for electricians over a lengthy period of time. We have therefore decided to remand this aspect of the case to the judge for further consideration in light of *FES*, including, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework.[29]

ORDER

The National Labor Relations Board orders that the Respondent, Contractors Labor Pool, Inc., Reno, Nevada, and various locations in California and Washington State, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they cannot distribute union literature on CLP jobs.

(b) Implementing a rule which effectively precludes the hiring of individuals because of their prior union wages.

(c) Discriminatorily denying job referrals to employees because they have engaged in union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the 30-percent rule that effectively precludes the hiring of union members as a result of their prior union wages, and reconsider the applications of such applicants.

(b) Within 14 days from the date of this Order, remove from its files any and all references to its disqualification of union member applicants based on its unlawful 30-percent rule.

(c) Within 14 days from the date of this Order, offer Shawn Smith and Vaughn Hedges full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Shawn Smith and Vaughn Hedges whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the amended remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to refer Shawn Smith and Vaughn Hedges, and within 3 days thereafter notify the employees in writing that this has been done and that the refusals to refer will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at each of its branch offices in southern and northern California, and Washington State, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent CLP's authorized representative, shall be posted by Respondent CLP immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent CLP to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent CLP has gone out of business or closed the facilities involved in these proceedings, Respondent CLP shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since November 25, 1992.

[29] Contrary to our dissenting colleague, we find that Respondent CLP has already had the opportunity to prove that it relied on a disabling conflict and the paid union "salt" status of alleged discriminatees in defending against the unfair labor practice charges in this proceeding. We, therefore, will not permit Respondent CLP a second opportunity to litigate such a defense before the judge on remand or in subsequent compliance proceedings.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent CLP has taken to comply with this Order.

IT IS FURTHER ORDERED that issues concerning Respondent CLP's refusal to hire and/or consider applicants based on application of its unlawful 30-percent rule are severed from this proceeding and remanded to the judge for further proceedings consistent with this decision.

MEMBERS LIEBMAN and WALSH, concurring.

I. INTRODUCTION

May a nonunion employer discriminate against paid union organizers who apply for jobs, because their union is aggressively pursuing lawful methods, in addition to organizing, to ensure that nonunion employers obey workplace laws and do not unfairly undercut their unionized competitors? Although the issue is not squarely posed in this case, our colleagues suggest that such discrimination would be lawful, at least where the union is prepared to see an employer's business suffer or even fail, on the theory that organizers and their union have a "disabling conflict" in such circumstances (even though organizers remain protected "employees" under the National Labor Relations Act).[1]

We believe our colleagues' position is inconsistent with the established understanding of protected union activity and inconsistent, as well, with the decisions of the Board and the Supreme Court in *Town & Country Electric,* 309 NLRB 1250 (1992), revd. 34 F.3d 625 (8th Cir. 1994), remanded 516 U.S. 85 (1995). At bottom, our colleagues seem to flirt with a view of labor-management relations that would preclude workers from pursuing their own economic interests, insofar as they conflict with the interests of their employer. Modern labor law—which recognizes both the reality and the legitimacy of economic conflict, but seeks to channel it constructively—has long since abandoned this idea. There is no good reason to revive it, whatever concerns may be raised by IBEW Local 441's angry rhetoric here.

For the reasons that follow, we would not apply the "disabling conflict" theory in a case like this one. We are troubled, moreover, by the vague contours of the theory, which appears to have been applied by the Board only once before in *Sunland Construction Co.*, 309 NLRB 1224 (1992), a case that strikes us at best inapposite and at worst wrongly decided.

II. FACTUAL BACKGROUND AND THE JUDGE'S DECISION

The facts are fully set forth in the judge's decision. Beginning in the early 1990s, IBEW Local 441 set out to address the proliferation of nonunion electrical contractors in certain construction markets in California and Washington State, which threatened its members' job security and wage and benefit levels. IBEW Local 441 employed various strategies to deal with this challenge, including political and public relation campaigns and attempts to organize the nonunion contractors.

IBEW Local 441's organizing efforts primarily involved membership training on effective organizing techniques, direct appeals to nonunion contractors to recognize IBEW Local 441, and a "salting" program through which IBEW Local 441 attempted, either overtly or covertly, to place its members with nonunion contractors. IBEW Local 441 expected the salts to competently perform their work for the contractors and, at the same time, assist the Union in a variety of ways.

Most of the salts were volunteers who merely provided IBEW Local 441 with information about the nonunion contractors and their employees. Other salts actively discussed the benefits of unionization with their nonunion coworkers and solicited them to join IBEW Local 441. Another "small group" of salts, who also were paid union organizers, engaged in "confrontational" strategies that went "beyond the customary solicitation of fellow workers to join or assist the Union." IBEW Local 441 encouraged them to uncover, and even provoke, unfair labor practices and to antagonize nonunion contractors by engaging in other concerted activities. Anecdotal record evidence suggests that the paid salts' activities led to the filing of a substantial number of unfair labor practice charges.[2]

As for the purpose of such activities, the judge credited former salt Ronald Staley's testimony that a fellow salt,

[1] We agree with our colleagues that proof of a "disabling conflict" of interest would not deprive the paid union organizers in this case of their status as employees under Sec. 2(3) of the Act. We also agree the disabling conflict defense is effectively an affirmative defense under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), that Contractors Labor Pool, Inc. (Respondent CLP) has not established that it relied on such a conflict when it refused to hire, or discharged, International Brotherhood of Electrical Workers, Local Union 441, AFL–CIO's (IBEW Local 441) paid organizers. As a result, we agree Respondent CLP is foreclosed from raising this defense to defeat either the finding that it violated Sec. 8(a)(3) and (1) of the Act or the discriminatees' remedial rights. Accordingly, the Board's opinion does not address this defense.

[2] As the judge found, IBEW Local 441 did not permit individual salts to file unfair labor practice charges. Rather, the salts reported the alleged violations to IBEW Local 441 and the Union determined whether to file a charge.

Michael Kaspar, told him, "We are not there to build their God-damn job . . . . If we can't get the workers, bankrupt the contractors." The Union's business manager, Doug Saunders, explained, "Well, we're out there to increase their costs of these jobs . . . to the [nonunion] contractors."

IBEW Local 441 itself issued periodic newsletters discussing these ongoing efforts to deal with the influx of nonunion contractors. Several newsletters touted the large number of unfair labor practice charges the Union had filed against nonunion contractors and the demise of unnamed nonunion contractors. As an example, the April/May 1993 newsletter boasted:

> Some of the biggest non union contractors have closed their doors . . . [and] no longer threaten to destroy our wage rate . . . Several smaller non union shops are out of business or closing their doors because our members have taken jobs as salts, and discovered how these petty crooks were cheating, not only their workers, but the taxpaying public as well . . . after our salts have learned the facts we take the case to the appropriate government body, and stay with it until the contractor is forced to play by the same rules as our contractors . . . as the cheaters are forced out everyone will benefit.

Similarly, another newsletter, pointing to the demise of unnamed nonunion contractors, concluded, "[W]e can be proud of the effort of this membership and its organizing program."

Based on this evidence, the judge found IBEW Local 441's paid organizers were not employees within the meaning of Section 2(3) of the Act and, therefore, were not entitled to the Act's protection. The judge based this finding on the theory that the paid organizers had a "disabling conflict" with employment by Respondent CLP, within the meaning of *Town & Country Electric,* 309 NLRB 1250 (1992), and *Sunland Construction Co.*, 309 NLRB 1224 (1992). The judge's finding of this disabling conflict flowed from his conclusion that the "activity of the paid organizers [was] designed not for the purpose of traditional organizing but more importantly to eliminate non-union contractors from the electrical job market." He explained:

> While the parameters of what constitutes a "disabling conflict" have not been delimited, it would appear that the record contains abundant objective evidence clearly showing that the motive and purpose of [the Union's] paid organizers is to engage in activities inimical to the employers operations. Given the state of the record herein, the on-the-job behavior of paid union organizers, if hired, may be readily presumed. Even though the work actually performed by the paid union organizers may be acceptable, it would appear that their activities in attempting to create confrontations with contractors for the purpose of generating unfair labor practice charges, whether ultimately meritorious or not, in furtherance of an [effort] to impact the contractors' financial viability, constitutes such a disabling conflict.

Having thus found that the paid organizers had a disabling conflict that removed them from coverage under Section 2(3), the judge found no violation of the Act could be based on Respondent CLP's refusal to employ them.

III. ANALYSIS

As we have suggested, our colleagues' view seems to be premised on the notion that IBEW Local 441's motives—to organize workers and to ensure compliance with the law, even to the point of inflicting economic harm on employers—preclude paid union organizers from serving as employees of the same employers. We disagree, because we believe that what our colleagues characterize as a "disabling conflict" is, to a greater or lesser degree, inherent in activity that modern labor law not only tolerates, but protects. Pursuing such legitimate activity, without more, is not incompatible with those duties that the law does impose on employees.

More than a century ago, Justice Oliver Wendell Holmes prophetically rejected the view that concerted activity by workers was illegitimate because it deliberately inflicted economic harm on employers. See *Vegelahn v. Guntner*, 167 Mass. 92, 104 (1896) (Holmes, J., dissenting). Economic competitors, Justice Holmes pointed out, routinely pursue their interests at each other's expense—and workers, like employers, are part of the system of competition. As he put it:

> The fact that the immediate object of the act by which the benefit to [workers] is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business.

Id. at 109. Justice Holmes' view, of course, ultimately carried the day, as the National Labor Relations Act demonstrates. To level the playing field between employers and workers, the Act protects a wide range of concerted activity by employees, even though it may be in sharp conflict with the economic interests of individual employers or of employers as a class. Needless to say, there is nothing "disabling" about this conflict.

We see no way to accept the notion of a "disabling conflict" in the circumstances of this case without rejecting well-established legal principles:

First, it is clear that paid union organizers are protected "employees" under the Act. Our colleagues acknowledge this principle, but then employ the "disabling conflict" theory to undermine it. Thus, they acknowledge the salts were employees but then conclude employers would have been free to discriminate against them based on their status as such, not their conduct.

Second, it is clear that protected concerted activity includes far more than organizing efforts, among them efforts that would necessarily cause economic harm to employers. Our colleagues rely heavily on the fact that organizing was not the only apparent goal of the salts here. But that is immaterial, so long as it could not be shown that the salts would perform their jobs incompetently or would engage in unprotected activity that harmed the employer, such as violence, sabotage, or disparagement of the business.

Finally, it is clear that the existence of a "disabling conflict" is an affirmative defense, with a heavy burden of proof. Here, the evidence simply falls short. Our colleagues rely more on IBEW Local 441's words, than on the salts' deeds.

A. The "Disabling Conflict" Theory and the Status of Union Organizers Under the Act

Current law correctly distinguishes between an adversarial relationship between a union and an employer and a "disabling conflict." In *Town & Country Electric,* 309 NLRB 1250 (1992), revd. 34 F.3d 625 (8th Cir. 1994), remanded 516 U.S. 85 (1995), the Board found the employer violated Section 8(a)(3) and (1) of the Act by refusing to hire, and by discharging paid union organizers because of their union affiliation. The employer argued that paid organizers should be excluded from Section 2(3) of the Act because they presumably "will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer's legitimate interests." In a holding approved by the Supreme Court, the Board squarely rejected this argument:

> The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer. Indeed, because the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective.

Id. at 1257. The Board thus rejected the presumption that a paid union organizer will not, or cannot, faithfully serve both his employer and his union, even considering their "adversary relationship." Id. As the Board observed**,** the Act does not contemplate or "require 'some type of transcendent loyalty' on the part of an 'employee' to the employer." Id.[3]

The result, as *Town & Country* makes clear, is that, "[i]n the absence of objective evidence, [the Board] will not infer a disabling conflict or presume that, if hired, paid union organizers will engage in activities inimical to the employer's operations." 309 NLRB at 1257. It is the employer's burden to establish an actual "disabling conflict," and that burden "is a heavy one." *CMT, Inc.*, 333 NLRB 1307 (2001); *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), enfd. 783 F.2d 1444 (9th Cir. 1986).

The judge here suggested the Board has failed to identify what constitutes objective evidence of a "disabling conflict" or activity "inimical to the employer's operations." On the contrary, the *Town & Country* decisions of the Board and the Supreme Court make clear what sort of conduct employers are *not* required to invite or tolerate. The Board explained that "employers lawfully may insist that employees adequately perform assigned work." 309 NLRB at 1257 fn. 35. "[U]nwillingness [or] inability to perform quality services for the employer," or engaging in "conduct warranting discharge," the Board said, would be evidence of a breach of an employee's duty. Similarly, the Supreme Court, in approving the Board's interpretation of Section 2(3), indicated that "acts of disloyalty . . . in kind or degree, to the point where the company might lose control over the worker's normal workplace tasks" would establish a disabling conflict**.** 516 U.S. at 96. The balance of the Court's discussion makes clear that "such acts of disloyalty" referred to acts of sabotage, disparagement of the company, and other "impermissible or unlawful activity." Id.

In sum, then, an employer may not establish a disabling conflict based on a paid organizer's status as such or his protected concerted activities, or claim that such activities are "inimical to [its] operations." Rather, the employer must provide objective evidence that the paid organizer has engaged, or will engage, in "such acts of

[3] The Board pointed out its long adherence to an "expansive interpretation" of Sec. 2(3) as covering "members of the working class generally," including part-time workers, persons working a second job, and others who may have divided loyalties. This approach, the Board observed, is consistent with the common-law agency principle that a "person may be the servant of two masters, . . . if the service to one does not involve abandonment of the service to the other." 309 NLRB at 1254 (quoting Restatement (Second) of Agency §226).

disloyalty" or "other impermissible or unlawful activity" warranting discharge.

Sunland Construction Co., 309 NLRB 1224 (1992), is not to the contrary. Our colleagues interpret the decision as holding that an employer could lawfully refuse to hire a paid union organizer during a strike, based solely on the "inherent[] and unmistakabl[e]" conflict between the union's legitimate objective to shut down the employer and the employer's legitimate objective to continue operating. On this view, the union is essentially held to its choice of economic weapons: once it strikes, it cannot also expect access to the workplace. As we will explain, we do not believe that this case presents a comparable situation. Withholding labor—as opposed to providing it and pursuing protected concerted activity—was not part of IBEW Local 441's strategy. Insofar as the *Sunland Construction* case, the Board expressly relied on "[the] presumption that someone who is being paid by the organization that is seeking to induce employees to withhold services would not be inclined wholeheartedly to provide services for the duration of the organization's effort," 309 NLRB at 1231 fn. 41, we do not believe it can be easily reconciled with *Town & Country,* supra.

B. The Scope of Protected Concerted Activity

IBEW Local 441's conduct here must be evaluated not only in light of the narrow scope of the "disabling conflict" theory, but also in light of the broad scope of protected activity under the Act. Section 7 protects concerted employee activities engaged in "for the purpose of collective bargaining or other mutual aid or protection." This protection encompasses employee attempts "to improve terms and conditions of employment" with their employer as well as attempts to "otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 therefore not only protects strikes, picketing, and handbilling, but a wide range of less traditional concerted activity as well. See, e.g., *BE&K Construction Co. v. NLRB*, 246 F.3d 619, 627 (6th Cir. 2001) (lobbying and petitioning related to safety and health standards protected by Sec. 7). Moreover, as our colleagues acknowledge, concerted "activity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer." *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 fn. 7 (1st Cir. 1976) (employee's reporting of employer's unauthorized work on union-label job to protect unionized binderies protected, even though employer lost business).

Thus, unions "may seek to increase the work of union subcontractors at the expense of nonunion subcontractors." See *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 625 (1975) (union may seek collective-bargaining partner's agreement to use only union subcontractors); see also *Montauk Bus Co.*, 324 NLRB 1128, 1136–1137 (1997) (union's solicitation of school district to cancel nonunion employer's contract and reassign work to union contractor protected and did not create disabling conflict). Unions also may seek to "level the playing field" between union and nonunion contractors by attempting to increase the latter's operating costs through vigorous enforcement of applicable laws. See *Petrochem Insulation, Inc.*, 330 NLRB 47 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001) (intervening in state environmental agency proceedings to oppose employer's permit requests; see also *Tradesmen International, Inc.*, 332 NLRB No. 107, slip op. at 3–4 (2000) (paid organizer did not engage in unprotected disloyalty by testifying before local board to aid union's effort to secure nonunion employer's compliance with a $5000 bonding ordinance).

It goes without saying that these activities may injure an employer's business, perhaps even to the point that the employer drops out of the market or goes out of business altogether. Section 7 nonetheless protects these activities because they directly serve unions' legitimate interests in enhancing their members' job security and protecting their wage and benefit levels. See *Petrochem Insulation*, supra at 50; *Montauk Bus*, supra at 1136–1137.

C. The Failure to Prove a Disabling Conflict

Respondent CLP has not shown by objective evidence that IBEW Local 441's paid organizers had engaged or, if hired, would engage in acts of disloyalty or other impermissible or unlawful activity inconsistent with their duties as employees. Consequently, we would find Respondent CLP has failed to carry its "heavy" burden of establishing a disabling conflict justifying its refusal to hire, and its discharge, of the Union's paid organizers.

Most important, the judge specifically rejected as baseless Respondent CLP's contention that Kaspar's comment, "We are not there to build their God-damn job," was evidence IBEW Local 441 encouraged slowdowns or sabotage. To the contrary, as noted by the judge, the Union instructed the salts to perform their work competently, and Respondent CLP has not shown that any paid organizer failed to do so. Similarly, the judge made no finding that the Union or any paid organizer disparaged Respondent CLP or its services. Our colleagues' reliance on *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953) (disparagement is unprotected disloyalty), therefore is misplaced.

Our colleagues contend that IBEW Local 441 and its paid organizers engaged in other conduct "tantamount to disloyalty." They focus on the judge's finding that the

paid organizers generated, and the Union filed, as many unfair labor practice charges as possible, "without regard to their merit." This finding does not support a conclusion of disloyalty.

To be sure, IBEW Local 441 encouraged the organizers to uncover unfair labor practices and filed a substantial number of charges. But Respondent CLP has not established that the Union in fact filed knowingly false charges or acted in bad faith.[4] The Union's newsletters indicate just the opposite; that is, that the Union held a good faith belief it was prosecuting wrongdoers. In the summer 1995 newsletter, Business Manager Saunders emphasized the Union's numerous charges were "against non-union contractors who have been flagrantly violating the law." Similarly, the April/May 1993 newsletter explained:

> Some of the biggest non union contractors have closed their doors . . . [and] no longer threaten to destroy our wage rate . . . . Several smaller non union shops are out of business or closing their doors because our members have taken jobs as salts, and discovered how these petty crooks were cheating, not only their workers, but the taxpaying public as well . . . *after our salts have learned the facts we take the case to the appropriate government body, and stay with it until the contractor is forced to play by the same rules as our contractor . . . as the cheaters are forced out everyone will benefit*. [Emphasis added.]

Further, as recounted by the judge, Staley admitted that no union representative ever asked him to lie when giving an affidavit in support of a charge. That evidence belies the conclusion that IBEW Local 441 filed charges in bad faith.

In reaching a contrary result, the judge erroneously relied on evidence suggesting that many of IBEW Local 441's unfair labor practice charges were administratively dismissed or settled prior to litigation. As the Board has recognized, charges are commonly withdrawn or dismissed, "and such disposition is not tantamount to a finding that the charges have been filed in bad faith." *LP Enterprises*, 314 NLRB 580, 581 fn. 6 (1994). Even if IBEW Local 441's charges ultimately might have proved lacking in merit, that still would not warrant a finding of bad faith or constitute a defense to unlawful action. See *Acme Paper Box Co.*, 201 NLRB 240, 246 (1973) (no defense that charge is ultimately not sustained). Finally, bad faith is not shown by the fact that IBEW Local 441 filed as many unfair labor practice charges as possible or even encouraged organizers to provoke violations of the Act. Cf. *Sommer Awning Co.*, 332 NLRB 1318, 1327 (2000) (filing of numerous unfair labor practice charges does not establish that charges were filed in bad faith); see also *M. J. Mechanical Services,* 324 NLRB 812, 813–814 (1997), enfd. mem. 172 F.3d 920 (D.C. Cir. 1998) (salting is protected even if partially intended to provoke unfair labor practices).

For these reasons, our colleagues' conclusion that IBEW Local 441 or its paid organizers engaged in conduct tantamount to disloyalty is unwarranted. They nevertheless suggest that the Union's activity either was not protected, or lost the protection of the Act, because it was "designed not for the purpose of traditional organizing but more importantly to eliminate nonunion contractors from the electrical job market." We disagree on both the facts and the law.

To begin, we would find that IBEW Local 441's primary objective was to organize nonunion contractors. As the judge found, former salt Staley credibly testified fellow salt Kaspar told him, "*If* we can't get the workers, bankrupt the contractors." (Emphasis added.) Insofar as Kaspar's statement can be attributed to IBEW Local 441, it shows that the Union's first priority was to organize those contractors. This is consistent with the judge's own finding that the use of paid organizers was only one component of the Union's overall organizing effort, which also involved information gathering by volunteer employee organizers, membership education programs, and direct appeals to contractors to grant IBEW Local 441 recognition.

Kaspar's rhetoric did attribute to IBEW Local 441 a fallback objective of driving nonunion contractors out of the market, or even out of business, if they did not recognize the Union. Unlike our colleagues and the judge, though, we would find nothing inherently illegitimate in this objective**,** which could be pursued through lawful and protected means. (If some contractors survived economically only by violating the law, then their demise certainly merits no sympathy.)

As stated, unions legitimately "may seek to increase the work of union subcontractors at the expense of nonunion subcontractors" or "level the playing field" by seeking nonunion employers' strict compliance with applicable laws. See *Connell Construction*, supra at 625; *Montauk Bus*, supra at 1136–1137; *Petrochem Insulation*, supra at 50; *Tradesmen International*, supra, slip op. at 3. And, in fact, the Union's April/May 1993 newsletter explained that IBEW Local 441 in part was trying to force nonunion contractors "to play by the same rules as [the Union's] contractors."

[4] We assume our colleagues would agree that the filing of Board charges may not be deemed disloyal absent evidence of bad faith. See Sec. 8(a)(4) of the Act; *Town & Country*, 309 NLRB at 1257 fn. 35.

Nor would we reach a different result even if IBEW Local 441 at some point actually abandoned all efforts to organize Respondent CLP's work force. Concerted activity—even when it is clearly adverse to the employer's interests—is protected as long as one of its purposes is related to "mutual aid or protection." See *Blue Circle Cement Co.*, 311 NLRB 623, 634 (1993), enfd. 41 F.3d 203 (5th Cir. 1994) (use of employer photocopier in connection with opposing plan to burn hazardous waste). Here, even if IBEW Local 441's attempts to increase Respondent CLP's operating costs were unrelated to organizing, those attempts still were directly related to the Union's legitimate interest in protecting its members' job security and wage and benefit levels. See, e.g., *Montauk Bus Co.*, supra at 1136–1137 (union did not engage in unprotected activity or create a disabling conflict of interest when, after it became obvious nonunion employer would not recognize union, union solicited school district to simply cancel employer's contract). See also *Petrochem Insulation v. NLRB*, 240 F.3d 26, 30 (D.C. Cir. 2001) (approving Board's finding that unions' intervention in state environmental and regulatory permit proceedings to protect negotiated employment standards was clearly protected).

Finally, our colleagues erroneously condemn IBEW Local 441's activities based on their opinion that the Union's objective to increase nonunion contractors' costs was "unnecessary to any of the union's legitimate interests." Our assessment of the necessity of concerted activity is irrelevant. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962). Under the Act, it is for employees and their unions to decide how and when to exercise their rights under Section 7.

Conclusion

The Act recognizes both the reality and the legitimacy of economic conflict between employers and employees. Indeed, the Act affirmatively protects concerted employee activity that is unavoidably, and even deliberately, inconsistent with employers' economic interests. Unlike our colleagues, we would not deem employees' pursuit of such activities a "disabling conflict" or "inimical to [an] employer's operations."

Our colleagues would do so, we believe, because they fear the implications of IBEW Local 441's rhetoric and its candid acknowledgment that it is engaged in economic warfare. These fears, however, are insufficient to deprive the paid organizers, whom we all acknowledge are statutory employees, of the rights and privileges accorded that status. *Town & Country,* supra, teaches that in the absence of objective evidence, we may not presume or infer a disabling conflict. IBEW Local 441's rhetoric and conduct here was aggressive, but it was wholly protected. It did not cross the line into illegality or disloyalty, or otherwise lose its protected character, however offensive our colleagues may find it.

Of course, there are limits on what tactics unions and paid organizers may employ in their battle for survival. As the Board and Court in *Town & Country* made clear, employers may take appropriate action against paid organizers who violate valid work rules, fail to perform adequately, or engage in "acts of disloyalty" or "other impermissible or unlawful activity" warranting discharge. As the Board put it, when it comes to such conduct, "union organizers are not meaningfully distinguishable from other 'employees' under the statute." We agree. But this principle must apply with equal force when the activity engaged in by paid organizers is protected by Section 7. If it does, then no "disabling conflict" could be found here.

MEMBER TRUESDALE, concurring in part.

I agree with my colleagues that proof of a "disabling conflict" would not deprive the paid union organizers in this case of their statutory employee status. I also agree that Contractors Labor Pool, Inc. (Respondent CLP) has failed to show that it relied on a disabling conflict when it unlawfully failed to consider for hire or refused to hire applicants because of its 30-percent rule and when it unlawfully failed to refer Shawn Smith and Vaughn Hedges to new jobs because of their union activities. I write separately to express my view that Respondent CLP did prove that there was a disabling conflict that it could have lawfully relied on to refuse to hire or to continue to employ individuals who it knew were paid union organizers for International Brotherhood of Electrical Workers, Local Union 441, AFL–CIO (IBEW Local 441).

In this regard, the record contains both credited testimony and documentary statements from the union's newsletters showing clearly that IBEW Local 441 officially recognized the permanent cessation of nonunion employer businesses and the generation of unfair labor practice charges, without regard to their merit, as measures of success in the union's campaign. The union newsletter "IBEW Four Forty One," written by business agents, contained several articles touting its success in the number of nonunion contractors it had eliminated as competitors in its "battle for survival." Several business agents taught salts to "ask for anything in order to antagonize the foreman or owners of the company." One agent stated, "We are not there to build their [goddamn] job," but rather "if we can't get the workers, bankrupt the contractors."

Indeed, as noted by the judge, IBEW Local 441 does not deny the aforementioned objectives. It only seeks to qualify them by claiming that the imposition of addi-

tional costs on nonunion employers is simply a lawful incident of assuring that those employers derive no competitive advantage from failing to adhere to existing laws protecting employees' wages, benefits, safety, and other terms and conditions of employment.

The judge, however, took a different view. He found that IBEW Local 441 had little real interest in organizing nonunion employer targets of its salting campaign. Instead, he concluded that the Union sought through confrontation and litigation of unfair labor practice charges to disrupt those employers' operations and to impose such substantial costs on them that they would move out of the Union's jurisdiction or go out of business altogether. In sum, the judge determined that a "disabling conflict" existed within the meaning of *Sunland Construction Co.*[1] and *Town & Country Electric*,[2] based on "abundant objective evidence clearly showing that the motive and purpose of IBEW Local 441's paid union organizers is to engage in activities inimical to the employers operations."

In *NLRB v. Town & Country Electric*, 516 U.S. 85 (1985), after agreeing with the Board that paid union organizers are employees within the meaning of Section 2(3) of the Act, the Court carefully noted the limits of its ruling:

> This is not to say that the law treats paid union organizers like other company employees in every labor law context. For instance, the Board states that, at least sometimes, a paid union organizer may not share a sufficient "community of interest" with other employees (as to wages, hours, and working conditions) to warrant inclusion in the same bargaining unit. . . . We need not decide this matter. Nor do we express any view about any of the other matters Town & Country raised before the Court of Appeals, such as whether or not Town & Country's conduct (in refusing to interview, or to retain, "employees" who were on the union's payroll) amounted to an unfair labor practice.[3]

In the underlying *Town & Country* Board decision, as well as in the companion *Sunland Construction* case, 309 NLRB at 1230, the Board also placed limitations on the scope of its holding that paid union organizers are statutory employees:

> Our decisions finding that union organizers are not meaningfully distinguishable from other "employees" under the statute should not be read, however, to give paid union organizers carte blanche in the workplace. If the organizer violates valid work rules, or fails to perform adequately, the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee. See *Wellington Mfg. v. NLRB*, 330 F.2d 579 (4th Cir. 1964), cert. denied 379 U.S. 882; *Sears, Roebuck & Co.*, 170 NLRB 533 (1968). In the absence of objective evidence, however, we will not infer a disabling conflict or presume that, if hired, paid union organizers will engage in activities inimical to the employer's operations.[4]

The crux of a disabling conflict is conduct "inimical to the employer's operations." Typically, this conduct is tantamount to employee disloyalty. One example of disloyalty was at issue in the seminal case of *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). In that case, a technician's union had a collective-bargaining dispute with a television station, but did not go on strike. During their offduty hours, some of the technicians distributed handbills severely criticizing the quality of the station's programming. The handbills made no reference to the union, collective bargaining, or the ongoing labor dispute. The employer discharged the employees involved in the handbilling activity. Overruling the opinion of the D.C. Circuit, the Supreme Court affirmed the Board's view that the discharges were lawful.

Of particular relevance here was the Supreme Court's rejection of the lower court's opinion that the line between protected activity and unprotected acts of disloyalty should be drawn at illegality.[5] The Court did not regard illegality as the litmus test for protection. The Court held instead that while the employees continued to work for and collect a salary from the employer they owed a duty not to disparage the product or services of their employer or to hamper its sales, even if such activities would not violate any laws. In the case on review, the discharged employees did not relate their disparagement of the employer to any labor dispute. Under these circumstances, the Court stated that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise."[6]

[1] 309 NLRB 1224, 1230–1231 (1992)
[2] 309 NLRB 1250, 1257 (1992).
[3] Id. at 97.
[4] *Town & Country*, 309 NLRB at 1257 (fn. omitted), and *Sunland Construction,* 309 NLRB at 1230 (fn. omitted).
[5] *Electrical Workers Local 1229 v. NLRB*, 202 F.2d 186, 188 (D.C. Cir. 1952).
[6] *Jefferson Standard*, 346 U.S. at 472 (1953).

Since *Jefferson Standard*, the Board and Federal district courts have applied the disloyalty doctrine in various situations involving breaches of confidentiality,[7] diversion of business,[8] and insubordination.[9] *Sunland Construction* presented another variation on the disloyalty theme.

In that case, the Board focused on the role of a paid agent of the union in a conflict where both union and employer pursued legitimate objectives in a strike situation. Although finding that paid Union Organizer William Creeden was a statutory employee, the Board nevertheless found that the respondent's refusal to hire Creeden as a replacement worker during the strike did not violate Section 8(a)(3). Agreeing with the judge that "an employer should not be required during a strike to hire a paid organizer whose role 'is inherently and unmistakably inconsistent with employment behind a picket line,'" the Board stated:

> In our experience, when a company is struck it is not "business as usual." The union and employer are in an economic battle in which the union's legitimate objective is to shut down the employer in order to force it to accede to the union's demands. The employer's equally legitimate goal is usually to resist by continuing production, often with nonunit employees, nonstrikers, and replacements. Thus, an employer faced with a strike can take steps aimed at protecting itself from economic injury. For example, an employer can permanently replace the strikers, it can lock out the unit employees and it can hire temporary replacements for the locked-out employees. Consistent with these principles, we believe that the employer can refuse to hire, during the dispute, an agent of the striking union.[10]

I believe that the disabling conflict found by the Board with respect to the loyalties of paid Union Organizer Creeden parallels that of IBEW Local 441's paid union organizers in this case. Respondent CLP and the judge here have focused on two primary aspects of Local 441's salting campaign as evidence of a disabling conflict: (1) the avowed overarching objective of inflicting such economic injury on nonunion employers like Respondent CLP and its contractor clients that they will go out of business or at least cease doing business within Local 441's jurisdiction; and (2) as a principal tactic to achieve this objective, the generation of as many unfair labor practices as possible, without regard to their merit, in order to impose heavy legal expenses on targeted employers. Contrary to the Union's claims, I agree that these factors are separate from, and in some degree in conflict with, IBEW Local 441's organizational objectives. Furthermore, if the employer in *Sunland Construction,* supra, could lawfully decline to hire a paid "salt" whose union's legitimate objective was to shut down the employer until it acceded to the union's demands, it would seem a fortiori to follow that nonunion Respondent CLP could lawfully decline to hire, or to retain in its employ, a paid "salt" whose union's objective was to shut down the Employer's operations permanently.[11]

I emphasize the limitations of this opinion. First, the Act affords broad protection to employees who file unfair labor practice charges or otherwise seek access to the Board's processes. See *NLRB v. Scrivener*, 405 U.S. 117 (1972). This protection has been given to "salts" whose tactics in part are intended to provoke an employer to commit unfair labor practices. *M. J. Mechanical Services*, 324 NLRB 812, 813–814 (1997); *Godsell Contracting, Inc.*, 320 NLRB 871, 874 (1996). Neither of those cases entailed objective evidence that these tactics were used to further any purpose unrelated to organizing. In this case, however, there is objective evidence that IBEW Local 441 regarded the filing of as many unfair labor practice charges as possible, without apparent regard for their merit, as a most effective weapon serving a destructive purpose unrelated to the organizing of nonunion work forces.

It is also well established that unions have a legitimate interest in acting to benefit the employees of unionized employers in competition with nonunion employers. To this end, unions may seek to increase the work of union subcontractors at the expense of nonunion subcontractors. *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975); *Phoenix Electric Co. v. National Electrical Contractors Assn.*, 81 F.3d

[7] *NLRB v. Knuth Bros., Inc.*, 537 F.2d 950, 956 (7th Cir. 1976) (disclosing confidential information to customers is disloyal); *International Business Machines Corp.*, 265 NLRB 638, 644 (1982) (disclosure of wage data that was legitimately classified as confidential is disloyal).

[8] *Kenai Helicopters*, 235 NLRB 931, 934–936 (1978) (employee who planned to use strike to divert business to rival engaged in unprotected disloyalty); *Crystal Linen & Uniform Service,* 274 NLRB 946, 950 (1985) (strikers who worked for employer's competitor and solicited employer's customers to transfer business to competitor engaged in unprotected disloyalty).

[9] *Carolina Freight Carriers Corp*., 295 NLRB 1080, 1084 (1989); *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 231, enfd. mem. 636 F.2d 1210 (3d Cir. 1980).

[10] 309 NLRB at 1230–1231 (footnotes omitted).

[11] My colleagues acknowledge *Sunland Construction*, but find it difficult to reconcile with *Town & Country*. The implication is that they would overrule *Sunland Construction* and would limit the disabling conflict doctrine to instances of illegitimate or wholly unprotected conduct. Quite obviously, I disagree with this view and, for the reasons fully stated in this opinion, I would adhere to *Sunland Construction* and would apply it in factual circumstances similar to those presented here.

858, 863 (1996). Furthermore, unions may seek to "level the playing field" between union and nonunion contractors by insuring that the latter do not gain an unfair competitive advantage from failing to comply with laws governing their operations. E.g., *Tradesmen International, Inc.*, 332 NLRB No. 107 (2000). The Act protects employee conduct that is reasonably related to serving these legitimate goals even if it results in economic losses for the targeted nonunion employer. *Jefferson Standard* made clear, however, that even otherwise protected activity ceases to be protected if conducted in an excessive or indefensible manner. 346 U.S. at 474–475. I find that the present case presents such a situation, where IBEW's goal of deliberately inflicting serious economic injury on nonunion employers is unnecessary to any of the union's legitimate interests. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *Montefiore Hospital & Medical Center v. NLRB*, 621 F.2d 510, 516 (1980).

My colleagues' opinion to the contrary makes many of the same points about the protected nature of IBEW Local 441's activities. In their view, however, as long as a union's paid agents are engaged in concerted protected activity, they may do so with the sole objective of driving a targeted employer out of business and the employer is powerless to deny them access to its work force and jobsite to achieve this objective. I think it is well established that an employer is not so fettered in the protection of its fundamental property interests, even with respect to employees engaged in protected concerted activities with less damaging economic consequences. See, e.g., *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *American Ship Building* Co. *v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown Food Stores*, 380 U.S. 278 (1965); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

Based on the foregoing, I conclude that Respondent CLP has shown that IBEW Local 441 had a declared institutional policy of putting nonunion employers such as Respondent CLP out of business, that its paid "salts" encouraged and pursued this policy through the filing of as many unfair labor practice charges as possible, without regard for their merit, and that this policy and the tactics used to further it were not reasonably related to organizing or any other legitimate interests of Local IBEW 441, its members, and the employees it represents. A disabling conflict therefore existed between IBEW Local 441 and targeted nonunion employers, including Respondent CLP. Under these circumstances, as in *Sunland Construction*, supra, Respondent CLP was entitled for as long as the conflict existed to take steps aimed at protecting itself from injury by refusing to hire or to retain in its employ individuals whom it knew were paid agents of that union.

As I stated at the beginning of this opinion, however, Respondent CLP did not rely on the disabling conflict as the basis for disqualifying union applicants or for failing to refer employees Shawn Smith and Vaughn Hedges to further jobs. It relied instead on its 30-percent rule or, in the case of Smith and Hedges, on their known or suspected legitimate union activities. Respondent CLP has only raised a disabling conflict issue in the limited context of its erroneous legal argument that paid union salts of a union enmeshed in a disabling conflict are not statutory employees. I therefore agree with Members Liebman and Walsh that Respondent CLP has committed the alleged 8(a)(3) violations and that it is not entitled to litigate the disabling conflict issue as a *Wright Line*[12] defense in future stages of this proceeding.

CHAIRMAN HURTGEN, dissenting.

I do not agree that Respondent CLP's "30-percent rule" was unlawful under the *Great Dane* "inherently destructive" theory.[1]

Under Respondent CLP's 30-percent rule, Respondent CLP would not hire applicants who had a prior wage history of earning 30 percent or more above Respondent CLP's wages. Respondent CLP had performed an analysis which showed that such applicants, if hired, would likely not remain with Respondent CLP for very long.

My colleagues condemn that policy under the "inherently destructive" theory of *Great Dane*. As noted, I disagree.

Great Dane is based on an analysis of Section 8(a)(3). Section 8(a)(3) has two basic elements: (1) discrimination; and (2) a motive to discourage (or encourage) union membership. In *Great Dane*, the first element was clear. The employer had discriminated along Section 7 lines. Strikers were denied benefits, and nonstrikers were given benefits. As the Court said:

> There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form. [388 U.S. at 32.]

Further, that discrimination could surely have a discouraging *effect* on strikers. The Court said:

> Similarly, there can be no doubt but that the discrimination was capable of discouraging membership in a labor organization within the meaning of the statute. Discouraging membership in a labor organization "includes discouraging participation in concerted activities

[12] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Manno Electric, Inc.,* 321 NLRB 280 fn. 12 (1995).

[1] *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967).

> . . . such as a legitimate strike." *[NLRB] v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). [Id.]

However, all of the above was not enough to establish the violation. There remained the issue of *motive* (element 2 above). The Court said:

> The statutory language "discrimination . . . to . . . discourage" means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose. [Id. at 33.]

The issue of motive was the principal issue before the Court. As to that issue, the Court said that some discriminatory conduct was "inherently destructive" of employee rights. As to that conduct, actual evidence of motive need not be adduced. The conduct speaks for itself. The Court said:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. [Id. at 34.]

Other discriminatory conduct has only a "comparatively slight" impact on employee rights. As to such conduct, the Court said:

> Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. [Id., emphasis added.]

In the instant case, *there is no showing of discrimination*, and thus the *Great Dane* analysis ("inherently destructive" vs. "comparatively slight") does not even apply. Respondent CLP did not discriminate along Section 7 lines. Rather, Respondent CLP drew a line between high-wage earners and low-wage earners. A high-wage earner with a nonunion background (e.g., based on skill and experience) was not eligible for hire. A nonhigh-wage earner with a union background was eligible for hire. Thus, there was no discrimination prohibited by the Act.

My colleagues note that the relevant statutory phrase is discrimination "in regard to hire." However, the quoted language does not obviate the need to show discrimination, i.e., disparate treatment along Section 7 lines. Rather, the phrase *adds* the requirement that the discriminatory conduct must have some impact on hire.

My colleagues also rely on Title VII principles. However, they cite no cases in which these principles have been applied in an 8(a)(3) context. This is so because the language and the legislative history of the two statutes are markedly different.

Further, even assuming arguendo that my colleagues could surmount this hurdle, Respondent CLP's policy was not "inherently destructive" of employee rights. The "employee right" herein is the right to be a union member. There is no "right" to be a high-wage union member. Respondent CLP's policy may have been "inherently destructive" of the job opportunities of those who worked for high wage companies, but the policy was not "inherently destructive" of the right to be unionized. Phrased differently, those who worked for high-wage companies may have priced themselves out of the labor market, just as high-labor cost companies may price themselves out of a construction market. But these are the consequences of economic considerations, not the consequences of prohibited discrimination.

Finally, there is no showing that Respondent CLP's conduct was unlawfully motivated or discriminatorily applied. Indeed, these are the missing elements which prompt the majority to embrace the "inherently destructive" contention. Further, my colleagues concede that Respondent CLP had a legitimate business justification for its policy.

Based on the above, I conclude that Respondent CLP's "30-percent rule" was lawful. Since Respondent CLP relied on that rule in rejecting applicants, there was no 8(a)(3) violation.

1. The disabling conflict

I agree with Member Truesdale that there was a "disabling conflict" of interest between IBEW Local 441 and its employee-supporters on the one hand and Respondent CLP on the other. As to this matter, I merely supplement Member Truesdale's opinion, so as to further respond to certain points made by Members Liebman and Walsh.

In addition, I part company with Member Truesdale because I would permit Respondent CLP to argue, in supplementary proceedings, that backpay should be tolled because of the disabling conflict.

2. Further response to Members Liebman and Walsh

I agree with Members Liebman and Walsh that union activity does not become unprotected simply because, as a consequence thereof, the employer may be economically harmed by that activity. However, where, as here, the purpose of IBEW Local 441 and its employee-supporters is simply to injure the Employer, I believe that

conduct in pursuit of that goal is unprotected. Thus, if a union and its supporters know that organizing the employer's employees is futile, and set out to punish the employer (and its employees) for their nonunion status, their conduct is unprotected.[2]

Members Liebman and Walsh appear to take the position that it is protected activity for a union to seek to drive a nonunion employer out of business, if the ultimate goal is to protect the standards of unionized employees elsewhere. I disagree. The union can seek to organize the nonunion employer, and/or can seek to have him conform to "area standards," but I know of no case that would protect a blatant effort to drive him out of business.

A closer question arises if the union and the employees seek to organize the employer's employees, but resolve to injure the employer if the effort fails. In my view, the activity becomes unprotected at the point where the union gives up its campaign and simply seeks to punish the employer. See the discussion, infra.

3. Response to Member Truesdale

I agree with Member Truesdale that, if the "conflict of interest" had been the Respondent's motive for not hiring the employees, the failure to hire would have been lawful. However, Respondent CLP's motive was the 30-percent rule. My colleagues have found that rule to be unlawful. I disagree. But, accepting my colleagues' view as the law of this case, that does not preclude Respondent CLP from tolling backpay.

Where an employer, after a discriminatory discharge, learns of facts which would have warranted the discharge, the employer can toll backpay as of the time when he learned of those facts.[3] In the instant case, it is not clear when Respondent CLP learned of the "conflict of interest" facts. Further, assuming arguendo that IBEW Local 441's purpose changed from protected to unprotected, it is not clear when that occurred, or when Respondent CLP learned of the change. These matters involve the possible tolling of backpay, and thus can be litigated in supplementary proceedings.[4] The burden will be on Respondent CLP to show the date on which backpay should be tolled. In addition, IBEW Local 441 should have the opportunity to show that, at some point, it removed the disabling conflict.

[2] Although the filing of colorable unfair labor practice charges is protected, filing of spurious charges intended to harass is not protected. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

[3] See *Tel Data Corp.,* 315 NLRB 364, 367 (1994), enfd. in part and revd. in part 90 F.3d 1195 (6th Cir. 1996), and cases there cited.

[4] To the extent that conduct occurred prior to the end of the hearing on the merits, Respondent CLP would not be allowed to introduce further evidence. As to subsequent conduct, Respondent CLP would be able to adduce evidence. Respondent CLP could make "tolling" arguments based on all such evidence.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that they cannot distribute union literature on CLP jobs.

WE WILL NOT implement a rule which effectively precludes the hiring of individuals because of their prior union wages.

WE WILL NOT discriminatorily deny job referrals to employees because they have engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the 30-percent rule that effectively precludes the hiring of union members as a result of their prior union wages, and WE WILL reconsider the applications of such applicants.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to our disqualification of union member applicants based on the 30-percent rule.

WE WILL, within 14 days from the date of the Board's Order, offer Shawn Smith and Vaughn Hedges full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Shawn Smith and Vaughn Hedges whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful re-

fusals to refer Shawn Smith and Vaughn Hedges, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to refer will not be used against them in any way.

CONTRACTORS LABOR POOL, INC.

Yvette Holiday-Curtis, Esq. and *James C. Sand, Esq.,* for the General Counsel.

Robert W. Tollen, Esq. and *Debora A. Morrison, Esq. (Bronson, Bronson & McKinnon LLP),* of San Francisco, California, for the Respondents.

Ray Van der Nat, Esq., of Los Angeles, California, for IBEW Local 441.

David Hannah, Esq. (Hafer, Price, Rinehart & Robblee), of Seattle, Washington, for certain other named unions.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV**,** Administrative Law Judge**.** Pursuant to notice a hearing in this matter was held before me in Los Angeles, California, Seattle, Washington, and San Francisco, California, on various days between September 11, 1995, and November 8, 1996. The original charge in Case 21—CA–29201 was filed on February 10, 1993, by International Brotherhood of Electrical Workers, Local Union 441, AFL–CIO (IBEW Local 441), and thereafter on March 30, 1993, a complaint and notice of hearing was issued by the Regional Director for Region 21 of the National Labor Relations Board (the Board), alleging various violations of the National Labor Relations Act (the Act) by W.D.D.W. Commercial Systems & Investments, Inc. d/b/a Aztech Electric, Inc. (Aztech) and Contractors Labor Pool (CLP). Thereafter, additional charges were filed by IBEW Local 441 against CLP. On December 6, 1994, IBEW Local 441 filed a charge in Case 21–CA–30409 against Fuji Electric Corp. and CLP. All of the above Region 21 charges resulted in the issuance of complaints and ultimately all such cases were consolidated for the purpose of hearing.

In addition, the various labor organizations named above in the caption of this proceeding filed complaints in Regions 20, 32, and 19 against CLP. Thereafter, the Regional Directors of Regions 20, 32, and 19 issued various complaints and notices of hearing against CLP, and all such cases were consolidated for purposes of hearing with the aforementioned Region 21 cases, and were given Region 21 case numbers.

All of the complaints herein allege violations of Section 8(a)(3) and (1) of the Act by CLP. Two of the complaints allege violations by Respondent Fuji or Respondent Aztech, as well as CLP. Each Respondent has denied in its answer, that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Respondents, counsel for IBEW Local 441, and counsel for certain other named labor organizations. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent CLP is a Nevada corporation, with a principal office located in Reno, Nevada, and with other offices located in the States of California, Washington, Arizona, Oregon, and Nevada, and is engaged in the business of providing temporary workers to construction contractors. In the course and conduct of its multistate business operations, CLP annually provides services valued in excess of $50,000 to customers located outside the State of California.

Respondent Aztech is a California corporation, with an office and place of business located in Irvine, California, where it is engaged in the business of electrical design and subcontracting. In the course and conduct of its business operations, Aztech annually purchases goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

Respondent Fuji is a California corporation, with an office and principal place of business located in Torrance, California, where it is engaged in the business of electrical contracting. In the course and conduct of its business operations, Fuji annually derives gross revenues in excess of $500,000 and annually provides services valued in excess of $50,000 to certain enterprises located within the State of California, each of which enterprises annually purchases and receive good valued in excess of $50,000 directly from points outside the State of California.

It is admitted, and I find, that CLP, Aztech, and Fuji are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

It is admitted and I find that at all material times, the various Unions named in the caption of this proceeding are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues in this proceeding are whether the various Respondents herein have engaged in conduct violative of Section 8(a)(3) and (1) of the Act by discharging certain employees and/or by failing to hire certain applicants for employment; and whether Respondent CLP, in violation of Section 8(a)(3) and (1) of the Act, has implemented a discriminatory or inherently destructive hiring policy that precludes or limits the hiring of employees who have previously earned in excess of 30 percent of CLP's wages for comparable employment; and whether the salting practices of the various unions are such that union applicants for employment are not employees within the meaning of the Act.

B. The Facts

1. Business operations of CLP; the 30-percent rule

Thomas McCune is chief executive officer and chairman of the board of CLP, and has been associated with it since its be-

ginning in 1987. CLP has 15 offices located in five States: Arizona, California, Oregon, Washington, and Nevada. It is in the business of providing both skilled and unskilled labor to licensed contractors on an as-needed basis, and provides workers for most of the construction trades at most skill levels.[1] The workers it employs, according to McCune, are CLP's employees in every sense of the word.

CLP advertises itself as the West Coast's largest nonunion supplier of labor.[2] It has continually grown since its inception, and in 1995, the last calendar year prior to McCune's testimony in February 1996, CLP had placed some 3000 *new* employees, that is, not including its regular employee complement hired prior to 1995, in its computer system as being eligible for referral to customers. As CLP only hires on an "as needed" basis determined by current and projected labor demands, it would appear that the large majority of these 3000 new employees were actually put to work.

CLP has "partial competitors" in the construction industry but no one with the range of skills hired by CLP except, collectively, various trade unions. Thus, unions are considered to be competitors, as both CLP and the Unions furnish labor, and CLP's "overwhelmingly" nonunion customers compete for the same jobs as union-signatory contractors.

McCune testified that a principle difference between CLP and other nonunion suppliers of labor is that most of its competitors do not screen personnel: Typically they act as sort of a hiring hall for day laborers who come in the morning, register for work, are sent to jobs that day, and are paid for that day's work at the end of each day. CLP, on the other hand, is an employer with a large number of regular customers and its own employee pool, and over the 10 years of its existence it has continually attempted to hire as many permanent employees as possible. According to McCune, CLP's experience has been that it is able to hire much better quality workers, much safer employees, and provide much better customer satisfaction if its employees "work for us and know how we work and stay with us." However, while CLP places a premium on worker retention within its organization, most of its customers have their own employee complement and utilize CLP's workers as nominally "temporary," although this temporary work may extend from several days to several months or more.

CLP's application process among its various offices or branches is standardized and does not vary significantly among the various offices: Ads are placed in local newspapers for the skills needed; the applicant phones a voice mail number and is told when and to which CLP office to apply, and what to bring to the orientation;[3] and customarily a number of individual applicants will show up at the designated time and place. At this time they fill out a very comprehensive application, and are shown a video and are given a flip chart orientation by one of CLP's office staff, during which they are told of the nature of CLP's business and their obligations as employees if they are found to be acceptable. They are told that CLP requires that its customers be treated like customers, and that CLP can provide decent and steady employment to employees because of its extensive customer base and its reputation in the industry for furnishing qualified, competent employees who "help our customers make a profit."

At some point during the application process the applicant will customarily have a brief private conversation with a CLP branch employee, usually the branch manager, who looks over the application and accompanying documents for errors or omissions in order to facilitate the process. This conversation is not necessarily considered to be an interview, however, as McCune testified that experience has demonstrated that a thorough investigation of the information furnished on the application is more likely than the mere subjective impressions of an interviewer to result in the acceptance of qualified employees. Customarily the application process takes between one-half and 2 hours, apparently depending on the time it takes for an applicant to complete the paperwork and whether he or she may have to wait for the private conversation with the application reviewer.

While branch office personnel may begin to immediately process the applications if time permits and there is an immediate demand for workers, it appears that in the Respondent's southern California region the application and accompanying documents, called the "hard file," is usually forwarded to the headquarters office where such verification and reference checking work is performed by full-time application processors. These individuals process the applications by checking DMV information, by contacting prior references and verifying prior employment for as much as 5 years, and by soliciting the impressions of former employers as to the applicant's work performance. Salient data regarding each applicant may be placed in an individual's computer file by any CLP employee, and such information may be accessed from the CLP computer network by any CLP employee at any CLP location at any time. Each contact with the applicant is entered into the computer, and the Respondent has developed a "telcom" program which permits it to enter extensive information in abbreviated and sometimes rather cryptic form into the computer file of each employee, accompanied by the initials of the CLP employee who has entered the information.

In the event the applicant meets all of the hiring criteria and guidelines, as discussed below, the applicant is noted in the telcom file as being "AFH," meaning "available for hire." However, the individual is not considered to be actually hired until he or she makes a telephonic commitment to accept the first work assignment. Thus, the individual will customarily phone the branch to advise of his or her availability for a work assignment, and branch personnel will return the call, and identify the location of the construction site and the approximate duration and the hourly wage rate for the job. The individual may accept or reject the job at that time. Rejection of a job is not considered a "performance failure," noted in the telcom

[1] Its workers include laborers, carpenters, electricians, plumbers, painters, sheetrock hangers and tapers, cement finishers, and tile setters.

[2] On occasion, according to McCune, its ads or materials may inadvertently refer to it as the West Coast's largest supplier of nonunion labor, but this is incorrect as its customers know that it often furnishes workers who are members of labor organizations.

[3] When a prospective applicant phones the number in the newspaper ad, a voice message tells the applicant where and when to report and to please bring their driver's license and social security card and 5 years' job history or educational experience, with phone numbers.

notes as a "PF" and denoting instances when an employees may, for example, have performed substandard work or may have failed to comply with any of the Respondent's rules of conduct ; rather, it is recognized that individuals may refuse a job for a variety of legitimate reasons, and this has no effect on their AFH status.

In the event that a cursory look at the application, while the applicant is still in the office, would reflect that he or she is not eligible for hire, it is CLP's policy not to so advise the rejected applicant in a face-to-face conversation. Thus, McCune testified that, "[w]e're in the construction industry and we're worried about violence in the workplace . . . so in general, what we want to do is get the person out of the office and inform them of whatever has happened on the telephone." Further, there was much record testimony and documentary evidence regarding the evolution of CLP's handling of rejected applicants. Initially, rejected applicants were not contacted at all, and if they called to inquire about their status they were simply told, in effect, that the position for which they applied had been filled. Later, CLP initiated a developing series of "sorry letters," reflecting CLP's attempts to notify rejected applicants of their rejection in a manner which would evoke the least response and resentment. Thus, rejected applicants were never given the specific reason for the rejection, either telephonically or by mail, and were told in rather ambiguous and admittedly deceptive language that the job for which they applied had been filled, and sometimes that they need not apply again in the future.

During the application process, according to McCune, the first item under "Code of Conduct" in the orientation flip chart, states: "No show, no call, no job. Call in at least one hour before job starts." McCune testified that no-shows are a very serious and costly problem, and employees who, because of some emergency situation, are not able to work on any given day are required to call in so that the contractor may be notified and a replacement worker may be sent out in a timely manner. Regarding terminating their employment from a current job, applicants are told: "Give notice. No notice, no rehire ever." According to McCune, 2 weeks' notice is preferred and 1 week is required. Employees are customarily paid each Friday afternoon by bringing their timecard, signed by the customer's foreman, to any one of CLP's offices; checks are usually issued within 15 minutes. Paydays, according to McCune are very busy times, as paychecks are not prepared until after the worker has presented his signed timecard.

McCune testified that as a result of customer focus groups and surveys conducted by CLP, customers have responded that the most important service CLP offers is, as might be expected, to send out a screened, capable employee who has the tools needed for the job and who actually arrives on the job and does the work. Throughout the years of its existence, CLP has consistently attempted to improve its hiring and worker retention criteria with this goal in mind, and McCune testified extensively to the evolution of this process.

In the first years of CLP's existence, the Respondent experienced very disappointing results with a large percentage of employees who, after being sent out to jobs, were either unsatisfactory to the customer or disappeared within the first week or two. As a result of customer surveys which, in the earlier years of CLP's existence reflected this type of customer dissatisfaction, CLP determined to improve the quality of its work force. With this in mind it began both tightening up its application screening process and, after workers were hired, to improve their retention by according them better treatment, paying them in a more timely fashion, adding benefits, including substantial cash bonuses for longevity, and keeping them apprised of feedback from customers as to their job performance. In this latter regard, customers are sent post cards at the end of jobs, to be returned to CLP, grading their satisfaction in various categories with each CLP employee; favorable reports are frequently posted on a bulletin board at the branch offices as an incentive for the employees.[4]

Further, McCune testified that CLP regularly sends staff people out to visit jobsites to ensure that the contractor is operating safely, and to just get an idea of what is going on out at the job, and that staff personnel routinely call at the end of a job and talk with the contractor about the work that CLP employees have performed. According to McCune, "We supervise [CLP employees] in every other respect except the micro-supervision of the immediate job at hand."

Regarding the screening process, CLP added a requirement that each applicant submit a photocopy of his driver's license, and currently each applicant's DMV record is checked through a computer service to which CLP subscribes. McCune testified that, as a result of a study he conducted, it was found that people with poor driving records were twice as likely to be injured on the job as those with good driving records. Moreover, the driving record provides insight into the worker's reliability, and this translates into better customer service, fewer on-the-job accidents, and therefore fewer workers compensation claims. It is therefore CLP's policy that applicants with certain types of motor vehicle infractions may not be hired; further, it is CLP's policy that applicants without reliable vehicles are ineligible for employment, as it is presumed that this too would effect their reliability.

In 1990, CLP began emphasizing the importance of both the quality and the quantity of reference checking, and instituted a study called "gap analysis" in attempting to discover whether there was a relationship between unexplained gaps in employment on an application and problems with such employees after they were hired. It was found that workers with larger unexplained gaps in their prior employment history were prone to more on-the-job injuries and were rated lower by customers in terms of customer satisfaction. Thereupon, CLP began to disqualify applicants who had large unexplained gaps in their prior employment history.

Thereafter, in furtherance of the same goals, the requirement of verification of additional references was added to the hiring process: 3 continuous years of prior employment or, if the applicant had worked for one employer continuously, 5 years. In addition to these new requirements in the application process, McCune testified that CLP continued to improve the quality of

[4] It appears, however, from record evidence that contractors frequently regard these "report cards" as more of a nuisance that a help, and they are often discarded and not returned.

reference checking by more staff training of its personnel, so that the persons who processed applications and checked references would become more proficient in asking references certain open-ended questions and in identifying falsified, incomplete or incorrect information furnished by the applicant or by a reference.

In 1989, applicants were asked to state on their applications the amount that would be an acceptable hourly wage. If this amount was substantially higher than the rate CLP was willing to pay for that individual, the applicant was not hired as it was assumed that the employee would quickly become dissatisfied. McCune testified that although this wage disqualification did greatly improve worker retention, nevertheless CLP continued to be "plagued right through 1994 with a problem of having people go all the way through the process, be hired, be sent out on the job, and then within a week or two leaving our employment for another job." This is because, according to McCune, an individual who needs work will frequently indicate that he or she will work for lower wages simply to obtain employment, but once hired will nevertheless be dissatisfied with such wages if they are significantly below what the employee was accustomed to earning.

McCune testified that other studies demonstrated that 50 percent of "performance failures," for example, workers not showing up for their assigned job, or not performing properly, or quitting after a short time, occur with people who have worked for CLP for 2 weeks or less; 50 percent of accidents occur with workers who have worked with CLP for 30 days or less; and customer service problems are much higher with new employees than with employees who have longer tenure with CLP.

In 1993, McCune began working on a worker retention study[5] premised on his hypothesis that CLP was much less likely to retain for any appreciable period of time an employee who was previously earning much higher wages than an employee who was previously earning wages that were in line with the wages CLP was paying. McCune ran a large statistical study to determine if that hypothesis was true. The study and analysis was completed in 1994, and the results of the study were implemented in new hiring procedures and guidelines that became effective on November 8, 1994.

Thus, more specifically, McCune wanted to know the effect that higher prior wages would have on the likelihood that a worker would be retained for 100 hours or more of work with CLP within a 40-day period. One hundred hours was chosen as a rough break-even period as that was the number of hours of work it took CLP to recover its recruiting costs as a result of having hired the individual. For this study, McCune took a sample of workers hired between June 1, 1993, and June 1, 1994, in whose computer files appropriate data for the study was available, particularly the employees' wage rates prior to becoming employed by CLP. It turned out that from over 2000 workers hired during the relevant 1-year period there were 868 files that contained the appropriate data; this, according to McCune, was a relatively large and statistically significant sample. He found a strong graphical relationship between pay differential and whether or not the worker was retained: Eighty-six percent of the retained workers had less than a 30-percent wage differential between what they were making prior to working for CLP and what they made with CLP. The conclusion was that a 30-percent negative wage differential would eliminate about 20 percent of otherwise eligible workers, but would cause CLP's retention rate to go up by 3.5 percent. McCune completed his study in June 1994, and it was implemented in the hiring process in November, 1994.

McCune agreed that the perceived general result was obvious and to be expected as a matter of simple logic, namely, that employees who earned considerably higher wages with prior employers would, after being put to work by CLP, continue to actively seek out those higher paying jobs and would remain with CLP for the least time possible, while those who had earned lesser or comparable wages with prior employers would be more likely to remain in CLP's employ. But, according to McCune, the statistical analysis was not merely undertaken to validate this obvious conclusion, but more importantly to develop an implementing policy that would reflect such results and could be applied to the hiring process. Thus, it was necessary to discern the most favorable breakpoint or balance so that neither too many nor too few applicants would be automatically eliminated due to their prior wage rate.

On November 8, 1994, the results of the study were incorporated in a document entitled "Hiring Guidelines—Part I, Application Review and Confirmation." The document begins as follows:

> CLP branch personnel shall hire only those individuals who have been found to have accurately represented themselves, are qualified for the jobs available and meet wage guidelines. Individuals whose applications contain misrepresentations or fraudulent statements are not eligible for hire under any circumstances. The following guidelines are effective immediately:
>
> 1. Work History—5-year Requirement
>
> All new applicants for positions must provide a continuous work or work/education history going back 5 years from the application date. Any gaps should be explained by the applicant and noted in the file during the hiring process.
>
> 2. References—3-Year Confirmation Required
>
> Each applicant must list reference sources who can confirm the applicant's work history, pay rates, and skills for the past year as well as two additional years. . . . Ideally, each applicant's work history should be confirmed with two reference contacts.
>
> 3. Verification of Reference Telephone Numbers
>
> The telephone number of the past years' reference source must be verified to be the company's listed business telephone number. Tools for verification of the refer-

[5] McCune has a Bachelor's and Master's degree in economics. He was formerly director, dean of the graduate business program at St. Mary's College, where he taught quantitative methods. And he has performed perhaps 150 studies on various subjects using mathematical or statistical methods.

ence include the telephone directory, directory assistance, and TempNet's on-line reverse directory listing search. . . . References obtained from residential listings or from unlisted telephone numbers cannot be accepted.

4. Required Reference Information

A complete reference contains detailed information about the applicant's ability level and duties, attendance and punctuality, and eligibility for rehire. An applicant must have at least one complete, favorable reference to be eligible for hire.

5. Wage Guidelines

The applicant's work history should demonstrate that the applicant's pay expectations fall within acceptable CLP pay ranges. The starting CLP rate that is appropriate for the applicant's trade experience must be a reasonable match with the applicant's recent work experience. Applicants whose most recent year of work experience is at a pay level more than 30% higher or lower than the starting wages paid on CLP assignments are not likely to be retained in the pool, and must not be hired. If the applicant has worked multiple jobs in the past year, the wages should be added together and divided by the number of months worked. In the event that the applicant has been self employed during the past year, wages must not be more than 45% higher or lower than CLP would pay. Likewise, the wage rule should be waived for entry level laborers who are new to the work force, or new to construction.

The operative requirement that "Applicants whose most recent year of work experience is at a pay level more than 30 percent higher[6] or lower[7] than the starting wages paid on CLP's assignments are not likely to be retained in the pool, and must not be hired," is referred to as the "30-percent rule." The wages paid by CLP to its workers are dependent upon area wage surveys within the areas serviced by its various field offices,[8] and this new guideline virtually eliminated consideration of all union applicants for employment, as union scale for all crafts in jurisdictions where CLP maintains branch offices is greater than 30 percent above the wages paid by CLP for comparably experienced workers.[9]

The only new guideline not previously in effect is the one containing the 30-percent rule. The other four guidelines are new only to the extent that they were updated to include additional restrictive requirements which staff personnel were to follow in processing applicants; essentially, they require additional confirmation of employees' work history, and attempt to insure that falsified applications will be detected during the course of a thorough review of each applicant's prior experience.

McCune testified that through the years of its existence CLP's application process, together with the information requested on the application form itself, has been periodically updated, and this has resulted in an increasingly greater percentage of ineligible applicants. Thus, as reflected by one exhibit, in 1989, of a total of 6162 applicants, only 936 or 15 percent were found ineligible for employment. This percentage has increased every year, as follows:

Percent of applicants ineligible for hire by year

Year	*Applicants*	*Ineligible*	*%(percentage)*
1989	6162	936	15.19
1990	8253	2176	26.37
1991	6417	2513	39.16
1992	4291	2516	58.63
1993	7037	4358	61.93
1994	11507	8158	70.90
1995	12377	9287	75.03

Thus, in 1995, the first full year following implementation of the 30-percent rule, 9287 of 12377 applicants, or over 75 percent have been determined to be ineligible for hire;[10] further, extrapolating from McCune's testimony that the 30-percent rule has eliminated 20 percent of otherwise eligible applicants, it appears that CLP would have found eligible an additional 20 percent or some 600 applicants (20 percent of the 3090 applicants found acceptable in 1995), eligible for hire in the absence of the 30-percent rule. It may be reasonably presumed that the overwhelmingly majority of these individuals would have been union members.

McCune testified that as more stringent hiring guidelines have evolved and have resulted in more selective hiring, CLP has reduced its workers' compensation costs by $1 million, from 122 percent of its premium in 1990 down to 18 percent of its premium in 1995. Currently, its safety record is better than two-thirds of the contractors to whom it furnishes labor, and is substantially better than other companies engaged in the furnishing of temporary services. Thus, although it has been considerably more costly to develop a highly skilled work force, largely because it has become necessary to seek out and process more applicants in order to find the type of workers that fit CLP's market strategy, namely, highly competent and reliable

[6] This figure, according to McCune's statistical analysis, came out to 26.731 percent, but for practical reasons was rounded to 30 percent.

[7] It was also the case that the Respondent had unfavorable retention experience with employees who earned prior wages that were significantly below the starting wages paid by CLP, as they tended to be either unreliable or unsatisfactory.

[8] The managers in each office gather general wage information by talking to customers, through trade associations, jobsite visits, newspaper ads, and by other means, to determine representative area wage rates for the various crafts. An applicant's wage range is based on his or her skill level as determined by the staff person.

[9] For example, in the Los Angeles area CLP paid a top rate of $17 to $18 per hour for journeymen electricians, while union scale for such employees was $26.50 per hour; in Seattle, union journeyman scale for electricians was $22.95 per hour and CLP paid a rate of $17 per hour for employees with comparable experience.

[10] There appears to be some discrepancy in the percentage of applicants currently found ineligible for hire. Thus, the above-chart reflects a 75-percent ineligibility rate, while McCune testified that currently "one in eight" employees is hired, which translates to about an 88-percent ineligibility rate, and several of Respondent's staff personnel consistently testified that the current acceptance rate is about 15 percent, which translates to an 85-percent ineligibility rate.

employees who are willing to work on a regular basis for the wages CLP is willing to pay, nevertheless, according to McCune, such efforts have paid rich dividends. As the bar for an acceptable applicant has been raised, CLP is now experiencing a very high customer retention rate, very high worker ratings, and an enviable accident record.

To audit the work of its staff with regard to the handling and qualifying of applicants, McCune testified that CLP conducts a quarterly file review in which individuals from CLP headquarters visit each branch, review the files, take a random statistical sample, and grade the performance of the branches based on how well they have met the hiring and other guidelines. Further, headquarters' staff prepares a report comparing the results of each branch and promulgates the results. Finally, CLP has instituted a bonus program which pays a bonus to branches that meet or surpass the standards.

In order to validate the efficacy of the 30-percent rule, the Respondent presented Professor Robert Hall, as an expert witness. Hall is a professor of economics at Stanford University, and is also affiliated with the Hoover Institution. He is qualified as an expert in econometrics: the discipline of applying quantitative and statistical methods to economic problems. Hall essentially validated and expanded upon the methods used and the results obtained by McCune in his analysis of the benefits of the application of the 30-percent rule. Hall testified that McCune's decision to focus on only one aspect of the retention problem, namely wage rates, did not render his study invalid or of insubstantial usefulness as testified to, infra, by an expert witness for the labor organizations herein.[11]

According to Hall, McCune was simply attempting to discern the effects of a proposed business decision for which he did have valid and substantial statistical information; moreover, McCune did not have, according to Hall, other statistical information at hand necessary to perform, in effect, a textbook study of the problem as suggested by Professor Silberberg, infra, for example, including within the retention study the effect on retention of screening out applicants with certain types of driving infractions, or with varying amounts of prior experience. Thus, according to Hall, McCune was not writing a term paper for an econometrics course but was merely applying the Respondent's prior experience to examine why its employees quit early. Hall agreed that McCune did not need to conduct his analysis simply to show the obvious, namely, that the better the outside opportunities the sooner the employee is likely to quit his current employment for a better job; rather, McCune was looking for the best place to apply the screening criteria. This could not be done without analyzing data showing the Respondent's past experience, and Hall verified that the the correct prior wage cutoff or breakpoint according to the data, it turned out, was at approximately 30 percent.

Hall testified at length regarding his own analysis of the matter, and determined that the 30-percent rule had a positive effect of increasing, on an annual basis, the number of hours worked by employees hired subsequent to the adoption of the 30-percent rule by 6.3 percent. Hall testified that even with all of the efforts made by the Respondent to improve retention, the nature of CLP's business is such that it still takes a lot of new hires to keep this Company staffed, as the retention rates are not that high on an absolute basis. Hall testified that in the future, at a period in time when all the workers will have been recruited under the 30-percent rule, the Respondent will be able to hire 17-percent fewer employees, annually, to staff its business operations; as the Respondent currently hires as many as several thousand employees annually, a 17-percent reduction in the number of hires would be substantial. Further, assuming, for example, that the Respondent would be able to get the same total number of hours from about 285 fewer new hires, and, given, for illustrative purposes, the amount of $500 as the expenditure for hiring each new worker, this would translate to an annual cost savings of about $160,000, which will continue to increase in the future. Hall testified that such additional cost savings will improve the capital value of the Respondent (its worth to a prospective purchaser), by as much as $2 to $4 million.

McCune testified that CLP first became aware of any salting activities by its employees in about February 1993, when charges against CLP and one of its customers, Aztech Electric, infra, were first filed. Since that time CLP has become well acquainted with such salting activities, and has developed standardized safeguards and a staff training program purposefully designed to deal with such matters in a lawful way, and to keep CLP "out of trouble." McCune testified that CLP tried to devise a policy that was fair, equitable, and within the law, and which, if always followed, would insure that there would be no basis for complaints of unlawful conduct against it. Regarding CLP's compliance with NLRB proscriptions, McCune emphasized that CLP has hired some 18,000 employees since its inception in 1987, many of whom have been members of various labor organizations; and the instant cases are CLP's first experience with the NLRB.

CLP has disseminated to its staff pamphlets entitled, "How Do I Deal With Union Organizers Applying For Work At CLP?" and "How Do I Deal With Union Organizing By A CLP Worker At A Job Site?" each containing a detailed set of specific guidelines designed to provide virtual step-by-step instructions regarding the handling and documentation of a variety of such situations. These pamphlets were apparently issued in May 1995.

In addition, CLP has distributed a seven-page booklet dated June 1995, entitled "Guidelines on Reducing NLRB Related Problems," in which the "IBEW Local 441 Salter Campaign" is discussed as follows:[12]

> For the past two years, Local 441 of the International Brotherhood of Electrical Workers has been engaged in a campaign of "salting" electrical contractors. This means that Local 441 sends its members and sometimes its officers to apply for

[11] That witness, Professor Silberberg, faulted McCune for not conducting a "multiple progression analysis," designed to statistically analyze the problem in its totality, rather than merely one if its components, by simultaneously examining the interrelationship of a number of variables that could affect the results of the study.

[12] However, McCune explained that the booklet, distributed to all of its customers throughout the country, is designed to be generic and may be readily changed to tailor the language to the appropriate salting campaign of any specific labor organization.

> work at non-union electrical contractors. Sometimes they openly announce that they are members of IBEW Local 441 and that they intend to organize. Other times, they conceal the fact until after they are hired. In all cases, if they are hired, they begin handing out union cards and organizing electrical workers. What they really want, however, is to be refused employment or to get laid off. Once they are refused employment, or they are laid off, then they file unfair labor practice charges with the National Labor Relations Board. The purpose of the unfair labor practice charges is to tie-up a contractor in expensive legal proceedings and possibly to force the contractor to pay back pay. Sometimes the salters sign up with Contractors Labor Pool and get referred to a contractor in that manner. The purpose of this pamphlet is to advise you about the law on salters, so that you do not end up committing unfair labor practice charges [sic], regardless whether the salter is hired directly by you or comes to you from Contractors Labor Pool.

The contractor is then given the following rules to follow:

> 1. Do not refuse to hire a person based on the fact that he is a salter.
> 2. Do not lay off a person based on the fact that he is a salter.
> 3. All employees have the right to solicit co-workers to support the union, provided they follow the rules.[13]
> 4. You are not required to talk to a salter about anything, including wages and working conditions.
> 5. Don't look at union authorization cards and don't agree to any method of counting how many employees support the union.

The booklet continues as follows:

> **What Will Happen If You Follow The Rules**
>
> In most cases, salters are not going to be successful. . . . The salter doesn't really think he can organize your workers. He wants you to commit unfair labor practices. Don't do it.
>
> **What Contractors Labor Pool Will Do For You**
>
> Contractors Labor Pool carefully screens applicants. We check with former employers, and we screen out people who lie on their applications or who have poor work records. We don't hire people whose prior work experience is at wage levels so much higher than we pay that we know they won't stay with us. But we don't discriminate against union members. So, if a salter is truthful on his application and has a good work record, he may be hired by us and referred to you. If you follow the rules, that salter will not cause you any trouble. And, if you follow the rules and the salter files unfair labor practice charges against you, we will defend you. We will provide our legal counsel at our expense to defend any customer who has unfair labor practice charges filed against him by a person referred through our company. We reserve the right, however, to withdraw from defending any customer, if we conclude that the customer violated the rules.

In late 1995, McCune provided a statement or written testimony to a congressional subcommittee regarding the "IBEW salting campaign directed against CLP, and its Customers," in which he suggested that Congress consider legislation that would deny salting activities the protection of the Act, and that would prohibit organizing activity aimed at customers of businesses such as CLP.

McCune testified that staff employees are instructed never to input something in the computer which "calls out" that that person is a union person.[14] And if the applicant, in completing the application, emphasizes ethnicity, sexual persuasion, religion, union membership, or anything of a similarly legally-sensitive nature, the applicant is required to fill out a new application eliminating such conspicuous language.[15]

While there are extensive written guidelines for staff personnel covering all areas of the hiring process and, thereafter, dealing with CLP employees and contractors in work-related situations, McCune testified that in the absence of specific guidelines or in unusual instances where there are no guidelines that fit the situation, "good judgment and fairness overrides everything."

David Howell is vice president and general manager of the Washington State operations of CLP. He began working with CLP in the San Jose, California branch in June 1991, and began operating the Washington State branch in June 1993. Howell testified that the 30-percent rule, like many of CLP's hiring guidelines, was the outcome of an evolutionary process. Howell, who did not play any direct role in the genesis of the study of the 30-percent rule, testified that just prior to November 1994, McCune advised him of the study he was undertaking, and asked for his comments. Howell replied that the concept from a subjective perspective appeared to be very valid, as increasing worker retention had always been a priority. "Worker retention," according to Howell, "means the percentage of people who stay longer and work with us continuously, and this increases overall quality, or competence on the job, reliability, and customer satisfaction."

Howell testified that the 30-percent rule operates as an "automatic disqualifier" of the applicant and as soon as it is apparent from the application that the applicant's prior wages exceeded the 30-percent guideline there is no further need to process the application. This procedure has nothing to do with believing or disbelieving the individual's representation that he or she would be willing to work for lesser wages; rather, it merely reflects company experience, practical reality, and human nature that such applicants, if hired, would leave as soon as other jobs became available. Worker retention, according to Howell, has always been one of the major problems confront-

[13] The "Rules" regarding "Solicitations" and "Distributions" are discussed and the contractor is advised as to when such activity may be prohibited.

[14] However, it is appropriate to note an applicant's specific training in the telcom notes, such as "IBEW Apprenticeship Training," so that the applicant's expertise may be evaluated for purposes of assigning wage parameters and/or assigning the employee to a particular job.

[15] Thus, if a salt emphasized at the top of his application that if hired he intends to engage in organizing activity, the individual is required to fill out another application.

ing CLP, and has huge monetary significance to CLP's profitability. For example, Howell testified that in 1997 his Washington branch will probably spend about $70,000 on recruitment ads trying to hire people; the more people he retains the more he will reduce his recruitment costs and, further, he will also be able to reduce the staff personnel who process the applications.

However, according to Howell, the biggest savings of all will result from successful risk management, as "Everything we do in our hiring guidelines comes down to risk management, and all of our hiring guidelines have been structured toward controlling risk management." Thus, Howell explained that according to industry studies it has been demonstrated that the longer an individual works for an employer the greater likelihood that the employee will not cheat on a bogus workers' compensation claim, and will not inflate a legitimate injury. Further, CLP's statistics show that the highest percentage of injuries result with new workers. Thus, over 50 percent of on-the-job injuries have been sustained by CLP employees who have been employed for less than 60 days, and the figures are even more disproportionate for employees who have been employed for 30 days or less. McCune testified that every time there is an injury that is significant, and sometimes with respect to even minor injuries, the situation is automatically reviewed from a field aspect and a hiring aspect in order to ascertain whether anything could have been done, including, for example, more stringent application of the hiring guidelines, to have initially rejected the employee during the application process.

Howell acknowledged that with each more stringent change in CLP's hiring guidelines it became more difficult to find enough qualified people to fill the immediate demand, and that typically the branch mangers, who are compensated on the profits of a particular branch, complain to higher management about such changes. However, in Seattle, the implementation of the 30-percent rule did not present much of a problem, and "may have" amounted to a "couple percentage point" decrease in eligible employees. When asked if he had, in fact, calculated the effect of the 30-percent rule upon the operations of the Washington branch, Howell testified that he had not, and explained that:

> [I]f I were to look at the record, it'd have to be done in the context of the 30 percent rule came out with several other clarifications and additional hiring guidelines at the same time, and so it would be hard to isolate out that . . .one issue only.

Thus, Howell explained that additional rules were implemented or tightened up at the same time, and less flexibility in hiring was given to the staff. Thus, for example, procedures regarding identification of bogus reference phone numbers were implemented, and reference checking was tightened up. Also, according to Howell, the general state of the economy in terms of being favorable or unfavorable to construction was a factor to be considered. In addition, Howell explained that customer retention has increased significantly, and that there is a causal relationship between increased customer retention and increased worker retention. Other considerations which would have a tendency to increase customer retention and thereby worker retention, according to Howell, are: "We get better at hiring staff members. We get better at hiring field workers. We get better at training new staff members. We're hiring a higher quality of staff members than we did in the past. And those factors lead into . . . that our customers are more satisfied with our services as well, even though we have been increasing our rates to them at different times and different locations."

Howell testified that 90 percent of the business of the Washington branch is in the employment of laborers and carpenters, and only a small percentage of his business involves the employment of electricians. Further, CLP chooses not to employ some crafts. Howell concentrates his efforts on attempting to provide work for a permanent pool of workers, and is continually attempting to balance the number of workers available with the amount of work. In his opinion, the three primary ingredients affecting worker retention are the 30-percent rule, flexibility in employment opportunities, and long-term stable employment. Thus, the 30-percent rule eliminates employees who would not likely remain in the employ of CLP; offering employees the flexibility of intermittent employment entices them to come on board as employees; and as the relationship continues, long-term stable employment replaces the employees' initial preference for flexibility. In addition, according to Howell, there are many other benefits and incentives, including significant monetary safety awards which are doubled at the end of the year in order to induce the employee to remain in CLP's employ.

Howell testified that "a very large percentage" of his employees view CLP as their only employer. They are looking to work year round, and he does everything he can to try to have a flow of business that will enable them to be employed year round. Thus, according to Howell, he is able to provide work for two-thirds of his employees very close to full-time year round.[16] He represents his employees to his customers as quality employees who are full-time employees of CLP, and who come from a permanent pool of reliable workers.

Howell testified that he has had a difficult time finding qualified electricians in the Seattle area during the past year or two, and acknowledged that the application of the 30-percent rule has contributed to this situation. Thus, he currently has a smaller pool of electrical employees than he had previously, and does not have as many electrical contractors that are relying on him for services. However, as noted above, because he has so much more business in laborer and carpentry sales, he is "focusing more of [his] activities in those areas where [he] can get people and have a large demand for those services." Howell testified that, "I'm not being as proactive to go out and get more contractors in electrical, since I'm not able to, you know, have a growing pool of electrical workers."

[16] However, CLP periodic (monthly) reports show the Seattle retention rate as being approximately 35 percent. Howell was not questioned about this apparent inconsistency, and it may be that Howell's testimony and the company records reflect two different concepts. As Howell was not questioned about this matter, no adverse inferences will be drawn.

Howell testified that the Washington branch offices process about 1100 to 1300 applications each year, and of these about 15 to 18 percent are found acceptable for employment.

Howell testified that he and all the other branch managers of CLP have undergone training regarding union matters and that Howell has conducted at least a portion of one such meeting. Union matters have been periodically discussed at managers meetings since he has been with CLP: union organizing efforts, union applicants for employment, union advocates showing up at CLP offices with video cameras and tape recorders, people trying to provoke physical confrontations or being disruptive, individuals trying to read documents or eavesdrop on conversations in branch offices, and other such matters. However, all of the discussion was in the context of insuring that the branch managers complied with the law and that union applicants be accorded the same courtesies and rights as all the other applicants. Thus, Howell testified that, "[w]e don't discriminate against these applicants. We hire many union workers, both current union workers and ex-union workers." In this regard, Howell testified that contractors to whom CLP furnishes workers are not permitted to ask for nonunion workers and if they are insistent upon this as a hiring criteria CLP will refuse to fill the order because to fill such an order would be violative of NLRB law.

Eugene Silberberg is a professor of economics at the University of Washington, and is a self-employed consulting economist. He specializes in the use of mathematics in economics, an area highly related to statistics, and for the past 25 years has been the graduate program advisor for graduate students in economics. Professor Silberberg testified regarding the statistical methods used by McCune and the results obtained from his study of worker retention in connection with the 30-percent rule. Silberberg found CLP's reliance upon the study's findings, namely, that there was a direct "causality" between retention and the 30-percent rule, to be "very non-compelling," as he found that the measure or definition of "retention" utilized by CLP was "very, very crude," and that there were many other variables, things happening at the same time, that were not input into the analysis as possible contributing factors to the results obtained.

Thus, according to Silberberg, the relatively small increase in worker retention when considered in conjunction with other variables that were not accounted for rendered McClune's study rather inconclusive. Accordingly, Silberberg would not draw the inference that the implementation of the 30-percent rule was a *cause* of higher retention. Further, according to Silberberg, McCune's study demonstrated that, in fact, 60 percent of those employees whose prior employment was substantially similar to the wages CLP was paying nevertheless left the employment of CLP and were not "retained" within CLP's highly arbitrary definition of "retention," and this is indicative of the possibility that prior wages play a minor role in why employees decide to leave CLP's employment. According to Silberberg, McCune, given his expertise in statistical analysis, should have employed a more sophisticated and widely accepted, yet simple and readily available, method of testing his hypothesis, by the use of "multiple regression analysis," which, simply stated, is merely the inputting and analyzing of other significant variables and using all of them simultaneously to try to figure out what, in addition to the 30-percent rule, may affect CLP's worker retention rate.

2. Southern California offices of CLP

a. Background

Scott Ingersoll has been employed by CLP since November 1990, and is currently branch manager for the Anaheim and San Diego offices. He has worked in the Anaheim office since March or April 1994. Ingersoll testified that the procedure for processing applicants has changed only very slightly since 1994. It is generally as follows:[17] Applicants respond to ads placed in newspapers and call a voice-mail number where they receive directions to the office and the date and time to apply for work.; mail applications are not accepted. Applicants come into the office at the scheduled time and are processed as a group. They are given an employment application and are told that the dates of prior employment, reference phone numbers, and remembering to sign the application are critical and essential elements of the application process; this is stressed. It is standard practice to photocopy drivers licenses and social security cards. The applicants are given a brief safety quiz.

At some point, during or after they have completed the application, they will be given an oral flip chart presentation called an orientation: what CLP is; what it is looking for in terms of employee performance and customer satisfaction; how it operates; payroll procedure; calling procedure; and other general matters designed to acquaint the applicant with CLP's requirements and procedures. They will also be given a test, which apparently is not graded, specifically oriented toward their particular trade, and are required to fill out a tool list indicating necessary tools of the trade that they own. Each applicant, individually, will hand his or her application to a CLP representative and the application will be quickly reviewed to be sure that the all the necessary information is included and that the application is signed at the appropriate places. If the application is missing phone numbers or accurate dates, the applicant is told to call back with that information. Ingersoll testified that it is important and cost- and time-effective to obtain as much information as possible while the applicant is in the office. Applicants are told that they will be contacted within a week and are given a phone number to call in the event that they have not been contacted by CLP within that time.

According to Ingersoll, the best prospect for being referred to a job after the applicant has been notified of his or her eligibility for employment is "absolutely" for a person to call in every day. There are 10 opportunities a week for people to call on the voice mail system: Morning and evening, 5 days a week. This is explained to the applicants during the orientation process; they are told that it is to their advantage to call in during every check-in period and to be at home between the hours of 4 and 7 p.m. in order to receive calls from CLP regarding assignments for the following day.

There are a number of guidelines that are applied if there are more employees calling in for work than there are jobs avail-

[17] Abundant record evidence substantiates that the same application procedure is utilized at each of CLP's offices on a companywide basis.

able, and the CLP staff members making assignments attempt to match up the best person for the job, taking into account the individual's skill level and geographical proximity to the job site. Generally, the Respondent attempts to keep its regular long-term employees busy on a full-time basis during slow times or seasons of the year.

At the end of each job, CLP sends returnable post cards to the contractors so that they may rate their satisfaction with the abilities and performance of each employee. The customer gives the employee a "PSA" rating: "Punctuality, Skill and Attitude or Ability," and may include positive or negative comments. These "report cards" are sent by the contractor directly to the Respondent's corporate offices; and the corporate office uses them for statistical purposes and forwards them to the branch offices. The branch office then includes such information in the employee's file, and may physically post the cards on the bulletin board as an incentive to the employees and as an indication to the employees that CLP monitors and is interested in their work performance.

During 1994, the Los Angeles office was processing applications for five offices in southern California. As a result, according to Ingersoll, there was a backlog: "You're talking about time and tremendous workload in '94 when there was an earthquake and there was a lot of work going on." Thus, it sometimes took a month or more for an application to be processed. Applicants who successfully complete the screening process are considered to be eligible for hire, but are not in fact considered to be hired until they have accepted their first assignment. Any one of a number of staff personnel may process an individual's application and either disqualify the applicant or find the applicant available for hire; frequently, such staff personnel are not branch supervisors or managers, but are in the nature of clerical employees who process applications in accordance with established procedure. Sometimes this processing work is performed by personnel in the field offices; however, more frequently, in the Southern California branch offices, the field office personnel is busy with other duties and the applications are forwarded to the Los Angeles regional headquarters for processing where Lisa Ross or Karen Wald, or sometimes temporary office help, may make the determination of an applicant's eligibility for employment after checking references, the applicant's motor vehicle record, and applying the applicable guidelines.

According to Ingersoll, CLP's Anaheim office alone customarily receives between 700 and 1000 applications per year. As a result of CLP's stringent hiring requirements, it appears that only between 15 to 25 percent of these applicants are deemed to be qualified for employment by CLP.

Various complaints allege that CLP refused to hire or to continue to employ certain individuals, all members of IBEW Local 441, in southern California, because of their union affiliation. Each such alleged discriminatee is listed below, along with CLP's reasons for disqualifying the individual. For the most part, CLP's reasons for disqualification were presented by Scott Ingersoll, Anaheim branch manager for CLP, who had either personal knowledge of the individual or could discern from the employment application and notations by other CLP staff the reason(s) for the disqualification. Unless otherwise noted, the record shows that at the time these various employees were disqualified for employment it was either known or could have been easily recognized by the CLP reviewer that they were members of IBEW Local 441. Thus, each of them were known by CLP to be active union adherents, or had submitted employment applications denoting that they had worked for union contractors and had been receiving union scale, and sometimes also indicating that they had completed a union apprenticeship program. It is clear that all of these indicia are commonly regarded as denoting union affiliation.

b. Failure to hire or refer

Paul Yontz had previously applied at CLP in 1991, and was found acceptable for employment; however, he never worked for CLP. In August 1994, he went to CLP's Anaheim office, filled out a new covert or falsified application, and advised Ingersoll that he had previously been registered with CLP. Ingersoll advised him that he would look into the matter. Ingersoll testified that upon researching Yontz' past history with CLP, it was discovered that Yontz had been offered employment by CLP and had telephonically accepted a job in October 1991, but had failed to show up the first day of work and did not call in. Therefore, pursuant to CLP's established rules, he was automatically disqualified from further employment with CLP.

Thus, according to Ingersoll, Yontz was disqualified because Ingersolls' search of his prior employment history with CLP reflected that he failed to appear for a job assignment. It is a CLP standard practice of not offering further employment to employees who do not show up on jobsites the first day of employment, and unrebutted record testimony establishes that this policy is emphasized to applicants during their initial orientation session prior to becoming employed. Ingersoll testified that, "[i]n our business, it's a big problem from our customer's perspective, and contractors in general, that failure to show on an assignment on the first day is a big no-no. It's something that is a constant frustration for people in the industry. . . . If, on the other hand, someone does show up on the first day and subsequently for some reason something has come up to where they can't make it, that's a much different scenario and something of a legitimate reason . . . so there's definitely a distinct difference."

Ingersoll testified regarding his phone conversation with Yontz advising him of his ineligibility for further employment. During this phone conversation, Yontz denied that he had accepted a job in October 1991, and, according to Ingersoll, became "Very, very upset. His tone was very loud, very intimidating. I was thankful that it was a phone conversation and that he wasn't in the same office, in my office. But he was very loud, repeated several times that he was never offered a job and that we were discriminating. He threatened that he would take us to court."

Prior to the above-phone conversation Yontz, who had applied covertly, made Ingersoll aware of his union affiliation by submitting an updated resume containing such union-related information after being advised that his prior history with CLP was in the process of being researched. I find that this was contrived, and that Yontz knew he would be found unaccept-

able for employment as he was aware of CLP's policy regarding no-shows. Therefore, it appears that he deliberately provided Ingersoll with information indicating his union affiliation in order to generate an unfair labor practice charge. I credit the testimony of Ingersoll, which is confirmed by the Respondent's computer records, and shall dismiss the complaint allegation.

David Barber applied covertly with CLP in October 1994. He was hired and referred to several jobs. He disclosed his union affiliation by wearing a union T-shirt on December 2, 1994, on a jobsite, the day after Union Organizers Lawhorn and Kasper had come on the site to talk with some of the employees during lunch. His foreman asked if he was a union member and if he knew the union representatives who had come out the day before, and Barber acknowledged that he was a union member and that he did know the union representatives. Later that day his foreman again approached him and asked why he hadn't disclosed his union affiliation sooner. Barber said that it shouldn't really make any difference and, according to Barber, the foreman indicated that he didn't like union salts being on his jobs and did not like some of some of the tactics used by the Union. In addition to wearing a union T-shirt Barber distributed union literature during breaks and lunchtime for about a week thereafter. His employment with that CLP customer ended on December 9, 1994, because the job was completed. The entire CLP crew was sent back to CLP.

On December 9, 1994, Barber went to CLP's office to pick up his paycheck. He was wearing his union T-shirt, and Ingersoll, who handed him his paycheck, did not mention it. Barber testified that he didn't work for CLP after that date, although in late March 1995, he was told by his wife that CLP had called and was anxious to put him to work. However, he did not return the call as he was then working full time. About a week later, he received a letter from CLP, dated March 30, 1995, stating that he would need to update his application.

Regarding Barber, Ingersoll testified that he recalled that Barber was a good journeyman electrician who had been employed by CLP. At some point he learned from a phone call by a jobsite foreman that Barber had been engaging in union activity. Ingersoll asked if Barber was conducting his union activities during working hours or companytime, and the foreman related that there had been one minor instance of this but that he had spoken to the people involved and had resolved the situation; and thereafter there had been no further problems. Ingersoll told the foreman, who was knowledgeable about organizing activity, to follow the law. Thereafter the job was completed without incident. Ingersoll testified that the contractor was very happy with everybody that CLP had referred to the job, including Barber, and that he does not recall whether Barber was wearing a union T-shirt when he gave Barber his paycheck in CLP's office on December 9, 1994.

Ingersoll testified that Barber was not assigned jobs in November and December 1994 and in January 1995, because generally that is a slow period and construction work usually does not pick up until the following March or April. An exhibit introduced in evidence by the Respondent shows that there was a major slowdown beginning the end of October and into November 1995, and that although some of CLP's steady longtime employees were working, there was only one new electrician hired between early November 1994 and March 1995. According to Ingersoll, CLP's computer notes indicate that Barber did not call in for work between December 9, 1994, and January 9, 1995. Moreover, Ingersoll testified that the people who are most aggressive in calling are typically the people who get called first, and that Barber was not overlooked because of his union activity.

Currently, Barber's status with CLP is listed as "AF+," which means "Available in the future with circumstances." According to Ingersoll, when the new hiring guidelines became effective in November 1994, CLP personnel began reviewing all of the files, a lengthy process continuing into 1995, and everyone was required to meet the new guidelines. For this reason, Barber was sent a letter requesting updated information so that he could continue to be offered work. Barber has not updated his application as requested.

I credit the testimony of Ingersoll and shall dismiss this allegation of the complaint, as the foregoing record evidence shows that Barber, a known union adherent, was not denied work by CLP as a result of his union activity, and in fact was solicited for employment in late March 1995 event though CLP was well aware of Barber's union affiliation and prior on-the-job organizing activities. I shall dismiss this allegation of the complaint.

Michael Kaspar applied covertly with CLP on about July 13, 1993, and was hired. He was sent out to jobs thereafter. At some point he received a letter from CLP informing him that they would give him $25 for any electricians that he would refer to CLP who were hired and actually put to work. On October 13, 1993, he was offered a job by CLP at Sunwest Electric that was scheduled to last a couple of weeks. He accepted the job, and was to report to Sunwest the following morning. However, he did not report to work and did not call in because, "Due to what I saw as employees being discriminated against with known union affiliation by CLP I decided to go on an unfair labor practice strike in support of those workers who were being refused work." Thereupon, he and Claude Johnson, a union organizer and business agent, picketed in front of CLP's office with picket signs stating, "Unfair labor practice strike against Contractors Labor Pool." They picketed for only about 30 minutes in front of the office before discovering that the office was not open. Thereupon, Kaspar left a letter advising CLP of his unfair labor practice strike, and also both faxed and mailed a copy of the letter to CLP's Los Angeles office. Kaspar has not been referred to work by CLP since that time.

Ingersoll testified that Kaspar applied with CLP in 1993 and was found eligible for hire, and that CLP's computer file showed that thereafter there were several attempts to offer him work but for a long period of time he was not available because he was employed elsewhere. Finally, he accepted a referral to Sunwest Electric, but failed to report for work on his first scheduled day. On that day Ingersoll received a letter, wedged in the door frame of CLP's office, notifying CLP that Kaspar was engaging in a strike. Ingersoll was confused regarding this unusual situation and sought legal advice, as Kaspar had not complied with the rules by notifying CLP that he was not going to show up to work at the Sunwest job. A note in the computer file states, "10/17, Michael Kaspar accepted a job for Sunwest

Electric in Anaheim Hills at a wage of $16 an hour. He expressed no reservations at that time with the wages or the job description and committed to perform the work for the two weeks which the job was scheduled to run."

On Friday, December 5, 1994, Kaspar came to CLP's Anaheim office with another employee, Paul McPhail.[18] The office was very busy and there were about 20 employees in the office trying to pick up their paychecks for the week; also, the staff was trying to reassign people to new jobs for the weekend and the following week. McPhail and Kaspar began handing out booklets containing union-related information, and were talking to CLP's employees about the benefits of the Union. Ingersoll told Kaspar not to hand out the information on companytime and suggested that he and McPhail engage in such activity outside, explaining that this was a busy time and he was conducting office business, and their activities were very disruptive.

There was further discussion and they finally stopped. However, at this point McPhail went up to a bulletin board where rating cards are posted and he took down a card with his name on it that contained a negative report by one of the contractors he had previously worked for. McPhail told Ingersoll that he was going to remove his report card from the bulletin board and take it with him. Ingersoll said that he could not do that as it was company property, and directed him to put it back. He refused, and there was an elevated discussion. Ingersoll, who had not read the card at the time because it had been erroneously posted by a temporary and inexperienced member of the staff, said that it wasn't a bad report. However, the card said: "Poor, substandard conduit work. Disruptive to work force with union activities. Do not send back. Bad attitude. Abrasive." Ingersoll testified that negative report cards were not to be posted and that this was simply a mistake; rather, only positive evaluations are posted as an incentive to employees. McPhail then attempted to use the copy machine in the office to make a copy of the card, and Ingersoll put his hand on the machine and told him that he could not do so. At this point, McPhail brushed by Ingersoll, obviously intending to make contact, and Ingersoll said that that was assault and that, "[y]ou can't just run into me like that." Finally, another CLP employee who was waiting for his check stepped between them and separated them. Ingersoll testified that McPhail and Kaspar were trying to upset him and that in fact he was upset. Ingersoll said that he would call the police if they didn't leave. On leaving, with the report card, McPhail said, "We'll see you in court."

A half an hour later, Kasper returned the report card to CLP's office, and asked if he and McPhail could hand out more union information; Ingersoll said, "[N]o." Ingersoll also told Kaspar that he and McPhail had conducted themselves in an inappropriate manner and had disrupted office business, and that Ingersoll wanted to schedule an appointment with Kaspar to discuss what had happened in a "calm forum." Kaspar and Ingersoll agreed to have this discussion the following Monday, and later Ingersoll had to reschedule for the following Thursday instead of Monday. Kaspar agreed. However, as Kaspar did not appear for the meeting, he was assigned a rating of "AF+," meaning that the meeting would have to take place before Kaspar could be reassigned work.

Ingersoll did not hear from Kaspar again until May 17, 1995, when Kasper came in to reapply for work and, pursuant to standard procedure, was required to submit an updated employment application as he had not worked for CLP for some 6 months. On reviewing this 1995 application, together with Kaspar's prior CLP employment history and applications, Ingersoll discovered that Kaspar had submitted a fraudulent application and had falsified his past employment experience. Thus, consistent with established CLP guidelines, it was determined that Kaspar was no longer eligible for employment. I credit Ingersoll's testimony and find that Kaspar was not denied employment because of his union activity. I shall therefore dismiss this allegation of the complaint.

Vincent Cameron applied overtly with CLP on October 3, 1994. His employment application contained lengthy gaps in employment history, and Cameron testified that he was questioned about such gaps by Ingersoll at the time he submitted his application, and later by Karen Wald, as she was attempting to process his application. Cameron told each of them that he had been unable to find work during the relevant periods.

Ingersoll testified that Cameron's application contained three lengthy gaps in employment: a 7-month period from March to October 1994; a 9-month period from November 1992 to July 1993; and an 11-month period from September, 1991, to July 1992. As the gaps included some of the busiest times of the year in the construction industry, Ingersoll testified that CLP would find it very unusual that someone would not be able to find work during these periods of time. The general rule was that employment gaps of 6 months or more had to be accompanied by a convincing and acceptable explanation. Mere inability to find work is not considered to be an acceptable excuse; rather, CLP deems such gaps to be indicative of a potential problem or deficiency. There is convincing record evidence that CLP stringently applied this rule to union and nonunion applicants alike. I credit Ingersoll, and shall therefore dismiss this allegation of the complaint.

Mike Inouye submitted an overt application on October 3, 1994. Like Cameron, Inouye had three significant unexplained gaps in his employment history, and when questioned about them simply said that he had been unable to find work. Ingersoll testified that Inouye was deemed ineligible for hire for the same reason as Cameron, namely, that large gaps in prior employment reflected that the applicant would not be an acceptable worker. I credit Ingersoll and shall therefore dismiss this allegation of the complaint.

David Lawhorn applied overtly at CLP on September 13, 1994, listing his current employment as a business agent and organizer for Local 441. Ingersoll looked over his application and asked, "Oh, so you're a union member." Ingersoll asked him what he did for the Union and Lawhorn replied that he talked with nonunion electricians or unorganized electricians about the benefits of union membership. Ingersoll asked, according to Lawhorn, "If I put you to work, are you going to talk to workers on the jobs that we send you to?" Lawhorn said, "[Y]es, during appropriate and permissible times," and Ingersoll replied that this would be fine as long as such activities

[18] Ingersoll had had prior confrontations with McPhail.

were not on company time and didn't disrupt work. Ingersoll wanted to know if there was anyone he could talk to in order to verify Lawhorn's electrical capabilities. Lawhorn said that Ingersoll could contact Mendoza Electric; however, Lawhorn had not indicated on his application that Mendoza Electric was a prior employer.

Thereafter Lawhorn spoke with Karen Wald a few times, and was finally told by Wald that there was no work for him. Then he called Ingersoll and was told that the position he had applied for had been filled. He has had no further contact with CLP, and has never been offered employment.

On reviewing the application of Lawhorn, Ingersoll testified that Lawhorn had been disqualified because his most recent employer was with the IBEW as an organizer, not as an electrician, and the most recent electrical experience he had was in May 1992, almost 2-1/2 years prior to the date of the application. That, according to Ingersoll, was a substantial indicator that the applicant did not have current skills or current experience, and Ingersoll testified that under such circumstances there was a real possibility that the applicant would be slow, or make mistakes and cause property damage, or would be a safety risk to themselves and others. Further, in his application, Lawhorn represented himself as having worked in the trade from March 1988 through October 1990, but, upon checking this reference, it was found that this representation was not true. Thus, it was discovered that Lawhorn had been terminated by this employer in October 1989, not October 1990, and according to Ingersoll it appeared that Lawhorn was attempting to inflate or overexaggerate his true experience. Thereafter, Lawhorn was told that he needed to submit more current electrical experience, and he did then furnish a reference from mid-1993 until the present time. Ingersoll testified that he didn't believe that this was a valid reference because Lawhorn had neglected to include it in his original application. Accordingly, Lawhorn was disqualified because of lack of current electrical experience.

While the record reflects that another applicant was hired by CLP although he had not worked in the electrical field for quite some time, this particular employee, who had been a journeyman electrician, was hired at minimal wages as a helper or apprentice. There is no indication that Lawhorn was applying for an apprentice position.

I credit Ingersoll's explanation for the disqualification of Lawhorn, and shall dismiss this allegation of the complaint.

Claude Johnson is business representative and organizer, and he has held that position since April 11, 1994. Since July 1995 he has been vice president of Local 441. On September 13, 1994, he applied overtly at CLP, together with Lawhorn, listing his current employment as union representative and organizer. He handed Ingersoll his application and Ingersoll, having previously spoken with Lawhorn, said, "So you're from 441 also," and asked if Johnson was also going to attempt to organize the workers. Johnson said, "[Y]es," and explained that he would do it on his own time, during lunch and before and after work. Ingersoll said that as long as such activities were confined to those times there would be no problem. He asked about Johnson's experience in the trade, and said that CLP would check his references and that Johnson should call CLP in 2 to 3 days. Johnson and Lawhorn left together. Johnson contacted CLP on September 16, 1994, by calling a number given to him by Ingersoll. After calling several times it appeared to Johnson that further attempts to obtain employment would be futile. He has not been offered work by CLP.

Ingersoll testified that Johnson was disqualified because the application indicated a nine month gap in electrical experience history immediately preceding Johnson's employment as an organizer with Local 441; moreover, within the 2 years prior to his application, Johnson had worked for only two employers, each for approximately 2 months, and one of these employers replied to CLP's reference request by stating that Johnson was an "average" employee and that the employer would not reemploy him. I credit Ingersoll and find that Johnson was not offered employment with CLP because his recent employment history in the electrical trade did not comport with CLP's criteria. I shall therefore dismiss this allegation of the complaint.

Howard Holman applied overtly with CLP in September 1994, at the Anaheim office. Ingersoll, according to Holman, said that he was impressed with his application and felt that he had a very good chance of becoming employed. He told Holman to call CLP at another number to inquire regarding his status. Holman called at the end of October, and was told by Ingersoll to talk to Karen Wald or Lisa Roth, other CLP staff representatives. On October 3, 1994, Holman called and talked to Lisa Roth, who advised him that she was waiting for employment verification from a couple of his prior employers, and that if he wanted to speed up the process he should call the two contractors, Apollo Electric and Causey Electric, and get them to respond to CLP's requests. Holman testified that he replied, "[S]omething to the effect of I believed that that was her job and I would let her handle it." Holman called again about the end of October, and was told by Karen Wald that he was not employable by CLP. Holman asked her why, and she said that she was not required to give out any information; then she put Lisa Roth on the phone and Roth said that Holman was not employable by CLP and should look elsewhere for employment.

Karen Wald testified that she processed Holman's application, and that Holman was disqualified because his application reflected that he had been continuously unemployed from December 1991 until May 1993, a gap of 18 months. This large gap in employment did not comport with CLP's guidelines as, explained previously by Ingersoll, lengthy gaps in employment are indicative to CLP that the applicant has been unable to find work because of some work deficiency or that the applicant has intentionally omitted a past employer who was likely to provide a negative reference. I credit the testimony of Wald and Ingersoll and find that Holman was disqualified for reasons unrelated to his union affiliation. I shall therefore dismiss this allegation of the complaint.

Merlyn Haase applied overtly with CLP on September 19, 1994. He advised Ingersoll that he was just looking for a short-term job as he was currently on temporary layoff status and intended to return to work for his prior employer upon being recalled. Ingersoll said that was acceptable. Hasse phoned CLP several times thereafter and was told that his application had not yet been processed. Later, Haase was advised that he was accepted for employment and began calling in for work.

His last call for work was on October 31, 1994. Thereafter, he was recalled by his prior employer and did not seek work with CLP again until May 1995, some 7 months later.

Ingersoll testified that Haase was found eligible for employment on October 24, 1994, and that the approximately 1-month delay between the date of the application and the determination of eligibility was due to an inordinate amount of work in the Las Angeles office, where applications were being processed. On October 24, 1994, Haase was advised of his eligibility for employment and he called in for work on October 25, 26, 27, and 31, 1995. On these occasions he was apparently offered three different assignments, but declined them. Thus, Hasse testified that, "I recall [Ingersoll] telling me that there was work available in the San Diego area. I recall him informing me there was apprentice work. On another occasion I recall him telling me there was work far away." Ingersoll testified that beginning in late October construction work slows down and the limited available work is given to CLP's regular employees. Haase did not continue to call in for work after October, and work is generally distributed to those employees who call in frequently; some employees will call twice a day. After Hasse called in for work on May 17, 1995, he was told that he would have to come in and update his application, in accordance with the customary procedure, as he had not been assigned work by CLP for over 6 months. Hasse did not comply with this request and has not updated his application; therefore, he is currently ineligible for referral.

I credit the testimony of Ingersoll and Hasse and find that Hasse, who was known to be a union member and was found acceptable for employment, was not denied employment opportunities as a result of his union affiliation. I shall dismiss this allegation of the complaint.

John Hasenaur applied with CLP on November 7, 1994, the day prior to the implementation of the 30-percent rule. Ingersoll testified that Hasenaur's application was not processed until after the rule became effective, and he became ineligible for hire for that reason, although it appeared to Ingersoll, upon his review of Hasenaur's file, that Hasenaur would have been qualified in the absence of the 30-percent rule.

Thomas Balik applied overtly with CLP on February 21, 1995. He spoke with Ingersoll. Ingersoll testified that Balik was deemed ineligible for hire because of the application of the 30-percent rule.

Michael Gillespie applied overtly with CLP at the suggestion of Johnson on March 21, 1995. Ingersoll testified that Gillespie was deemed ineligible for hire because of the application of the 30-percent rule.

Diego Duran applied overtly with CLP on October 23, 1995. It was stipulated that Duran was not hired because of the application of the 30-percent rule.

Paul Becker applied overtly on March 1, 1995, with CLP at the Anaheim office, and was told by Ingersoll that union members were hired and referred to jobs by CLP, and that the only request was that they refrain from engaging in union activity during company time. Becker stated that he understood this requirement. Ingersoll testified that Becker was deemed ineligible for employment because of the application of the 30-percent rule.

3. Northern California and Seattle, Washington offices of CLP

Beginning in early 1995, following the initial targeting of CLP by IBEW Local 441 in southern California, as discussed above, other local unions began targeting CLP's northern California and Washington State (Seattle) offices in a collaborative effort to obtain employment of their members in these geographic areas. Networking among West Coast Local Unions enabled them to share information, largely obtained by monitoring local newspaper advertisements, regarding when and where CLP was seeking employees, and these Unions, sometimes singly, and sometimes jointly, would send groups of members to seek employment when such ads appeared.

As a result of these efforts, well over 100 union members submitted applications to CLP, most of them applying overtly. Because these applications were submitted subsequent to November 8, 1994, the date that CLP implemented its 30-percent rule, the great majority of applicants were rejected because of their failure to qualify under the 30-percent rule. However, some applicants were rejected for other reasons as well, such as for submitting incomplete and inadequate applications and for misrepresenting their prior employment experience. It appears unnecessary to review the record evidence and recount CLP's rationale for disqualifying each such applicant. Rather, it is sufficient to note that the General Counsel has not demonstrated that CLP applied its hiring guidelines in a discriminatory manner either generally or specifically. Rather, all applicants, whether union or nonunion, were subjected to the same stringent application requirements and CLP has provided convincing reasons for disqualifying all applicants who were disqualified for reasons other than the application of the 30-percent rule.[19]

Initially, the Unions did not understand why union applicants were being rejected, and the nonspecific "sorry letters" sent by CLP often merely exacerbated the situation by implying that union applicants were not qualified for the work or that work was unavailable. This was clearly contrary to the belief and knowledge of the union applicants and their business agents who knew that they possessed the requisite experience and that they were being rejected at the same time CLP was continuing to advertise. Thereupon, on learning of CLP's 30-percent rule, certain unions attempted to "work with" CLP by submitting letters of introduction assuring CLP that their members were well qualified, that they would perform competently for CLP and its customers, and that they would engage in organizing activities only at appropriate times and places. Further, letters prepared by the Unions and submitted by individual applicants assured CLP that they had an understanding with their local unions that if hired the employees would be permitted to remain on the job and would not leave CLP's employ without giving adequate notice; in this manner, CLP could timely provide its customers with replacements.

[19] It should be noted that CLP staff personnel initially reviewed the applicant's prior wages, and if the applicant did not meet the 30-percent requirement the application was not processed further. CLP requested, and was given permission, to further examine such applications for other disqualifying deficiencies in the event that this should become necessary in later stages of this proceeding.

The aforementioned assurances were designed to cause CLP to waive its 30-percent rule; thus it was believed that what was perceived as the rationale for the 30-percent rule, namely, that highly paid union workers would precipitously leave in the middle of a job when higher paying work became available, would no longer be applicable to such union applicants who agreed to give adequate notice prior to leaving. However, the unions received no favorable response from CLP and such letters did not result in a relaxing of the 30-percent rule; thus, CLP either ignored or refused to accept the letters and continued to disqualify all of the applicants.

At some point, CLP began to place ads in newspapers in locales outside the geographical proximity of branch offices, namely, Eastern Washington, Idaho, Oregon (outside the Portland area), and North Dakota, and offered limited relocation expenses for electricians, carpenters, laborers, painters, drywallers, and all crafts, for possible relocation to Portland, Seattle, Phoenix, San Francisco, or Sacramento. Such ads were placed as a trial recruitment program by CLP to ascertain the efficacy of soliciting for workers in geographic areas of the country where wages were low and unemployment was relatively high; also, as admitted by David Howell, vice president and general manager of the Washington State operations of CLP, adherence to the 30-percent rule was resulting in a dearth of qualified applicants for certain crafts within the geographical areas of CLP's branch offices.

As a result of this out-of-state recruitment program, which was short lived as it did not prove to be successful, CLP hired only four worker for the Seattle branch: one carpenter, one laborer, and two electricians. Both electricians were paid union organizers and were collaborating with the Seattle locals in targeting CLP. One of them had attached to his application a resume that stated, "You should understand that, as an I.B.E. W. member, my intention is to educate my fellow electricians to the ways of the I.B.E. W. and eventually organize them," the other electrician applied covertly. Each worked for CLP for only about a week and then returned to Idaho; the overt applicant worked until the completion of the 1-week job, and the covert applicant, after about a week on the job, purportedly went on an unfair labor practice strike, allegedly in sympathy with other applicants who had not been hired, and thus left his employment in the middle of the job.[20]

The record evidence shows that in the Seattle offices, during times material, CLP hired very few electricians, although many union electricians applied and were rejected; that CLP was continually seeking and did hire laborers, although only four union laborers applied and each was rejected as a result of the 30-percent rule and other reasons; and that although CLP hired no plumbers, it rejected the four union plumbers who did apply as a result of the 30-percent rule and other reasons.

In the northern California offices of CLP, during times material, only union electricians who were members of various IBEW locals applied. For the most part, they were rejected as a result of the 30-percent rule.

4. Complaints against Aztech Electric and CLP

a. The facts

Vaughn Hedges was vice president of IBEW Local 441 from June 1992 to May 1995. He applied covertly with CLP in November 1992, and was found acceptable for employment. He was referred by CLP to a customer, Aztech Electric, on November 19, 1992, and reported the following day, November 20, 1992, to the job site where a grocery store, Smith's Food King, in La Habra, was being contructed. Hedges testified that when he arrived at the site someone pointed out Bill Adamik, Aztech's foreman, to him and that he "introduced himself" to Adamik. Asked if he knew Adamik before he met him at the Aztech jobsite, Hedges testified, "No, I did not." Another union salt,[21] Shawn Smith, was already on the job.

On November 24, 1992, at about 6:15 a.m., after working for several days, Hedges spoke with Adamik in the parking lot prior to work. Hedges testified that he told Adamik: "I felt the employees would be better off if they were represented by a union." Adamik replied, according to Hedges, that that would never happen; that Aztech would close its doors before that happened. Hedges asked if he meant that Aztech would go out of business before they went union, and Adamik replied, "[I]n a heartbeat and the men know it." Adamik went on to say that the men had been through this before and that Aztech had an injunction against the Union, and that if any union officials showed up on the job he would call the police on them. The conversation lasted about 5 minutes. Then Hedges went to work.

About 2 hours later, at about 8:30 a.m., Adamik approached Hedges, instructed him to pick up his tools, and told him that he wasn't needed any longer. Hedges asked if he was being let go because of his work performance, and Adamik said, [N]o, that they were satisfied with his work," but that Aztech needed to make room for "some shop hands" and that three CLP employees were going to be laid off that morning. He offered to take Hedges around with him while he laid off the others, and Hedges said he didn't need to witness that. Hedges then went to get his CLP timecard which was in his truck, and had Adamik sign it. At that time, according to Hedges, Adamik told him that he used to be a union member, but that he currently received good pay and benefits from Aztech, a nonunion employer. Hedges inquired about the pay and benefits of Aztech's other employees, and Adamik did not respond. Hedges asked if the earlier conversation that morning about the Union had anything to do with him getting laid off. Adamik replied that it had

[20] CLP maintains that the hiring of a known union organizer and the fact that both electricians left CLP's employ precipitously, after indicating their desire to relocate, is supportive of CLP's position that it was not averse to hiring qualified union applicants, and that the 30-percent rule was premised on the valid presumption that workers who were accustomed to better employment opportunities would not remain in CLP's employ.

[21] The attempts of union members to obtain employment with nonunion contractors and to thereupon engage in organizing or other activities is commonly referred to as "salting."

nothing to do with it, and that he had to lay off three CLP people to make room for Aztech's regular shop hands.[22]

After being laid off and having Adamik sign his timecard, Hedges went back to his truck, got some union literature, returned to the jobsite, and began to distribute it to the electricians while they were working. This was at about 8:30 a.m., during working time. Adamik told him to leave the jobsite and not to distribute literature on the job during working hours. Hedges complied.

He did not contact CLP until the next day, at which time he talked to Margo Zagreb, one of CLP's staff personnel. According to Hedges, Zagreb "angrily accused me of distributing literature on her [CLP's] time." Hedges said that he was doing it on his own time. She asked if he was a union member and Hedges didn't answer. She then told him that "CLP is a non-union company, that the contractors that they supply labor for are non-union companies and that they use [CLP] for that reason and they don't want union literature on the job, and she doesn't want it on her jobs either." She again asked if he was a union member, and Hedges asked what difference that made. He then asked if he would be getting more work from CLP, and Zagreb said, according to Hedges, "Yes, if it was available." He turned in his timecard the following Friday, and received his paycheck.

Thereafter, Hedges did not call CLP for further work assignments until some 4 months later, in March 1993, when he called to list himself as being available for work. He called in many times after that, between about March and September 1993, and was not offered any work. He did not call after that, as it appeared that CLP did not intend to offer him work again.

Shawn Smith belongs to IBEW Local 11, and was formerly a member of Local 441 (from 1987 through 1990). In September 1992, he was told by his Local 441 Business Manager Doug Saunders to apply with CLP. He applied covertly, and was accepted for employment. He was sent to work for Aztech Electric on September 26, 1992, and worked through October 1, 1992, a period of about 4 or 5 days. Thereafter he was given another job assignment with Aztech Electric, and began this job on November 9, 1992. He was told that he would be doing finish work as Aztech was trying to get the job completed, and to report to Bill Adamik, Aztech's foreman on the site. Smith had worked with Adamik before on prior union jobs, and knew him, and testified that he was surprised when he was told that Adamik was the foreman on the job.

Smith testified that on the afternoon of the day Hedges was laid off, Tuesday, November 24, 1992, Adamik approached him about 1 or 1:30 in the afternoon and jokingly asked, "Are you one of those union members, too." Smith said, "[N]o." The next day, Wednesday, November 25, 1992, during lunchtime, Smith met Business Manager Doug Saunders at Smith's truck. Saunders handed him a union T-shirt and the two of them went on the site to talk with Adamik. According to Smith there was some friendly conversation, as Adamik had formerly been a union member and he and Saunders had mutual acquaintances. Saunders asked about Smith's work performance on the job, and Adamik said that Smith's work was fine; also, in response to questions by Saunders regarding Aztech's workload, Adamik said that Aztech had plenty of work. Smith announced that he was there to hand out union literature and talk to employees about the Union. Adamik said that was fine as long as it was during breaktimes and after work. There was no testimony by Smith that either he or Saunders, who did not testify in this proceeding, asked Adamik anything about why Hedges had been laid off the day before. Thereupon, Saunders walked Smith back to his truck, and Smith then returned to work and continued working the remainder of the shift.

That evening at about 3:30 p.m. Smith went to CLP's office to turn in his timecard as Wednesday was payday at that point in time, and Pat Sweeney, who was in charge of CLP's Westminster office, told him that Aztech would not be needing him any longer; Sweeney did not give Smith an explanation for the layoff.

Simon Zeller applied covertly with CLP in May 1993. He was hired and worked on several jobs. On about May 27 or 28, 1993, he was sent to an Aztech Electric job, and at one point had a conversation with Aztech's jobsite foreman, Dave Proskol. According to Zeller's affidavit, during a conversation with Proskol in June 1993, regarding union activities, Proskol said that "his boss got tired of [union salts] handing out literature on the job and called CLP. He also said his boss told CLP they were handing out literature and not doing their work, and CLP called them back." This conversation allegedly occurred some 7 months after the November 1992 incident involving Hedges and Smith, and was proffered by the General Counsel as evidence supporting an unlawful motive for the layoffs of Hedges and Smith.

Dave Proskol currently works for Aztech Electric. Proskol testified that Aztech, at the time in question herein, was a very aggressive company with a lot of work, and had about 60 employees; and that at one point some 50 percent of Aztech's electricians were furnished by CLP. In 1993, Proskol was the foreman for Aztech on a job in the Mission Viejo area. Prior to that time he had been a field superintendent for Aztech, in a management capacity. Although he does not specifically remember an electrician by the name of Zeller, Proskol testified that at the time in question, having been part of management, he was familiar with union organizing; he knew what to say and what not to say to employees. He testified that he did not and would not have made a statement to any electrician to the effect that his boss called CLP on another job and had CLP electricians recalled because they were handing out union literature; nor did he ever tell anyone that Aztech used CLP to resolve union problems; nor did he ever tell anyone that CLP had sent out six electricians and that some of them were union members who tried to organize the job. Moreover, regarding the fact that Hedges had been laid off by Adamik shortly after the beginning of his shift, Proskol testified that it would not have been unusual to lay off electricians at 8:30 a.m. or even at 7 a.m., depending upon the circumstances, and that this was consistent with the manner in which Aztech operated.

Bill Adamik, currently a project manager for a different electrical contractor, testified that he was the foreman on the Az-

[22] It appears from Hedges' testimony that another electrician, Tony, was laid off during the same period of time. The record does not indicate whether Tony was referred to Aztech by CLP.

tech job in question in November 1992, and had been a foreman for Aztech from 1988 until 1995. He had been a member of IBEW Local 441 from 1984 until 1988, and testified that he knew Vaughn Hedges and Shawn Smith from his union days, as he had worked with them through the Union. Adamik testified that in November 1992, Smith and Hedges had been hired through CLP, and that Adamik immediately recognized them when they came on the job, and assumed that they were there for the purpose of attempting to organize.

In the morning of November 24, 1992, Adamik told Hedges he was letting him go as he had received a phone call from Aztech's office advising him that other regular Aztech employees were being sent to the job from other jobs that were finishing up. Adamik explained that it was Aztech's policy to give preference and retain Aztech's permanent employees, and that this was one of the reasons why Aztech used a temporary agency like CLP. Thereupon, he laid off Hedges and told him that he was being laid off to make room for regular Aztech employees as Hedges had been the last electrician hired. The following day, after receiving a similar phone call from his office, he intended to lay off Smith for the same reason, but Smith had already left the jobsite. Therefore, Aztech's office phoned CLP and advised CLP that Smith was no longer needed. Adamik said he could not recall when he received the latter phone call from his office, and doesn't remember whether it was before or after his conversation with Smith and Business Manager Saunders, which Adamik recalled was "around noontime." Adamik testified that there were about eight electricians on that particular job, and that three regular employees from another Aztech job were ultimately sent out.

Adamik testified that he let Hedges go about mid-morning on November 24, 1992, because Hedges was "pretty much done" with some cash registers that he was working on and, "I didn't want him to start anything else." After he advised Hedges that he was being laid off, Hedges started talking about the Union and how it would be best for the employees if the Company went Union. Adamik replied that this was up to Aztech and its employees. Then Hedges went to his car and got some union literature and proceeded to hand it out during the shift, at about 9:30 or 10 a.m. Adamik told him that he needed to leave, and he said, [O]kay," and left.

Adamik testified that Doug Saunders came out to the site at about noon with Smith. Saunders gave Smith a pink IBEW T-shirt, and Smith had some union literature with him. According to Adamik, there was no discussion regarding either the quality of Smith's work or of Aztech's workload, as Adamik would not relate such matters to a union representative.

Adamik testified that he is the one who selected Hedges and Smith for layoff, as they were the last electricians hired on the job, and that Smith, too, was performing work that had been virtually completed. Both Hedges and Smith were the last people hired and were just doing "odds and ends," and Adamik, not anyone from Aztech's office, made the decision to lay them off; they were not selected because of their union affiliation. Adamik denied that he asked Smith if he was a union member, as he already knew this. He did not tell either Hedges or Smith that Aztech would never have a union, or would close its doors before it went union, or anything of that nature.

Margo Nezrab testified in this matter on August 15, 1996. She was employed by CLP from February 1989 to December 1994. She had worked in various CLP branch offices, and in 1992 she was branch manager of the Sherman Oaks branch. She recalls Vaughn Hedges. She received a call from Terry Mullen with Aztech Electric, who said that Aztech no longer needed the services of Hedges; Mullen also told her that he thought she should know that Hedges was passing out union literature on the jobsite after he was released. Thereupon, Nezrab entered the following note in the Hedges' computer telcom file: "DNU [Do Not Use] until we talk," because she was concerned about his passing out union literature on the customer's jobsite after he had been let go, and she wanted to find out if he had in fact done this.

Sometime later Nezrab spoke with Hedges, and asked him if he had distributed union literature on the Aztech jobsite after he had been let go. He said, "[Y]es." She does not really know why she did not change the DNU telcom note after this conversation, but stated that she must have apparently believed that it was not permissible for Hedges to be passing out union literature on the Aztech jobsite during working hours after he had been released. However, when asked whether this is in fact why she did not change Hedges' DNU designation, Nezrab testified, "I don't know really know why I didn't change the DNU. I don't think one had to do with the other." Nezrab testified that during her conversation with Hedges she did not ask him if he was a union member, as this is not something she would have asked. She does not believe that she told him that CLP is a nonunion company, or that CLP's customers were nonunion and that they pay CLP's employees for that reason, as this, too, is not something she would say. Nor does she believe that she told Hedges that contractors don't want union literature on the job.

Nezrab testified that she does not recall Shawn Smith at all, as the events in question took place some 5 years ago; accordingly, she does not recall why Smith received a DNU designation at that time.[23]

Patrick Sweeney testified by conference call from Australia. He worked for CLP from 1989 to 1994 in various CLP offices including the Westminster office as an assistant manager. His manager was Nezrab. Sweeney recalls a worker by the name of Shawn Smith who worked for the Company in 1992. He never asked Smith if he was a member of any union; such questions were not asked as it was general policy that it didn't matter if a person was a union member or not. He initially assigned Smith to Aztec Electric and on payroll day he was called by Nezrab from a different office and was instructed that if Smith came to the Westminster office to pick up his paycheck, Sweeney was to inform him that Aztec no longer needed him on the job; during this conversation she did not mention anything about

[23] Respondent CLP contends that the complaint allegations pertaining to Smith and Hedges should be dismissed because the incidents occurred many years ago and the Regional Director refused to schedule the matter for hearing in a timely fashion, pursuant to CLP's repeated requests. Thus, according to CLP, it has been prejudiced by the inordinate delay, as such delay has caused CLP to be unable to reconstruct the events in question so as to provide an explanation for Smith's DNU designation.

Smith's union activity or conduct on the job. When Smith came in that afternoon, Sweeney simply related to him that Aztech no longer needed him on the job.

The record shows, however, that Smith's computer file contains the designation DNU or "Do Not Use." Like Nezrab, Sweeney does not know who entered the DNU designation into the computer, and is not aware of any reason why Smith might have been DNUed. He remembers Smith because he seemed to be "an honest nice guy who kind of stood out, very well presented, and was basically a cut above the other fellows." However, because CLP's computer file indicated that Smith was DNUed, he was not referred to jobs thereafter.

b. Analysis and conclusions

I do not find that Respondent Aztech discharged Hedges or Smith as a result of their union activity. Rather, I credit Adamik, and find that the two were released in order to make room for some of Aztech's permanent employees. Nor do I credit the testimony of Hedges, Smith, and Zeller regarding alleged coercive statements made to them by Adamik or Proscol, Aztech's foremen. Accordingly, I shall dismiss these allegations of the complaint.

However, I credit the testimony of Hedges regarding his conversation with CLP's manager, Nezrab, and find that Hedges admitted that he had distributed union literature on the job during working time after he had been laid off. Nezrab told him that Aztech didn't want union literature on the job, and that she didn't want it on CLP jobs either; further, she told him that he would be getting more work from CLP if it was available. Nezrab testified that she does not really know why she did not change the DNU telcom note after this conversation.

There is no showing that at this time CLP had made it clear to its employees that union activity at appropriate times and places was permissible. Accordingly, I find that the statement to Hedges, assuming that Hedges was an employee within the meaning of the Act, infra, was coercive in nature and is otherwise violative of Section 8(a)(1) of the Act, as it could be interpreted to prohibit the distribution of union literature at appropriate times and places. Further, as Nezrab was unable to specifically testify that Hedges was permanently DNUed because of his distribution of union literature during working hours, and rather testified that she does not know why she did not remove the DNU disqualification after her conversation with him, I conclude that CLP has not sustained its burden of proof under *Wright Line*[24] by demonstrating that Hedges was disqualified for nondiscriminatory reasons.

In the absence of any contrary credible evidence proffered by CLP it may be reasonably presumed from the foregoing that Shawn Smith was DNUed because of his apparent association with Hedges and the Union. Thus, he was DNUed at the same time as Hedges, and as he had not distributed union literature during working hours there is no legitimate reason to have disqualified him for further employment. Accordingly, I conclude that whether by inadvertence or otherwise, CLP failed to refer Smith to jobs subsequent to November 25, 1992, as a result of his permissible union activity on the Aztech job and/or his association with Hedges.[25]

While it is clear that CLP's discrimination against Shawn Smith and Vaughn Hedges would otherwise be violative of Section 8(a) (1) and (3) of the Act, it is found below that certain members of IBEW Local 441 may not be employees within the meaning of the Act, and may not be entitled to the Act's protection. Similarly, it appears that otherwise coercive statements made by Manager Nezrab to Hedges may not be violative of Section 8(a)(1) of the Act. Therefore these matters are relegated to the compliance stage of this proceeding.

5. Complaints against Fuji Electric and CLP

a. The facts

On September 13, 1994, prior to implementation of the 30-percent rule, Peter Smith, a member of IBEW Local 441, applied overtly with CLP. Ingersoll asked him if the past employers listed on his application were union contractors, and Smith said, "[Y]es." They discussed the IBEW apprenticeship program and, according to Smith, Ingersoll said the IBEW had a good apprenticeship program. Ingersoll said it would take a week or two until they could process Smith's application, but, according to Smith, by the time he got home there was a message from Ingersoll on his machine that CLP had a job for him. He was sent to work the following day and worked for 2 or 3 days. After that he was sent to South Coast Electric where he worked for a couple of weeks until, on the day that he had handed out some union literature on the site, Ingersoll called him and said that South Coast Electric didn't need him anymore.[26]

Thereafter, Smith called CLP for work but received no job assignments for several months. In May or June 1995, someone from CLP called and asked if he wanted to go to work in Arizona at $22 per hour plus per diem. Smith said, "[N]o, it was too far." After that there were no other contacts between Smith and CLP.

In October 1994, Smith was hired by Construction Temps Inc. (CTI), another firm that furnishes temporary construction workers to contractors. CTI sent Smith to Fuji Electric. Fuji's foreman was Edwin Gutierrez. James Kusinsky, another union salt, was already working on Fuji job, and Smith and Kusinsky knew each other. Smith testified that one day Gutierrez said that he had told Sam Fuji, owner of the Company, that Smith and Kusinsky were good workers, and that Sam Fuji said he wanted to keep them on until the end of the job. On the following day, Smith wore an IBEW T-shirt to work and Foreman Gutierrez and several employees asked if he was union. Smith said, "[Y]es." At lunchtime he handed out union literature and talked with Guiterrez about the Union. He also asked Guiterrez

[24] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[25] I find no merit in Respondent CLP's laches argument even though the hearing in this matter has been delayed for a substantial length of time due to no fault of CLP. Thus, the charges regarding the incidents were timely filed, and CLP could have undertaken an investigation of the matter in timely fashion and could have preserved its evidence until the matter came to trial.

[26] Apparently there was a charge filed, and the matter was settled. CLP was not a respondent in that case.

if he could bring some union guys to the site the following day. Gutierrez was agreeable as long as there was no obligation for anyone to join the Union.

On October 20, 1994, Smith asked Gutierrez if he would like to have a raise; Guiterrez said that he would. Smith testified that he had already spoken to Kusinsky and another employee about raises. Smith asked Gutierrez if he would call the shop and ask Sam Fuji about granting raises to all of the electricians. Gutierrez reported to Smith that he had tried to this but that Fuji wasn't in. Thereupon, Smith asked Gutierrez for permission to call the shop, and Guiterrez said that he didn't care. Smith called several times during working hours and finally reached Sam Fuji. He explained to Fuji that he was one of the electricians on the job and that the guys on the job wanted raises. Fuji told him to come in after hours and talk about it because "this is not the time to discuss raises," and then hung up.

That day, October 20, 1994, at lunchtime, Union Representatives and Organizers Lawhorn and Johnson came on the site and talked with Gutierrez and the employees. There was discussion about the benefits of belonging to the Union, and Lawhorn and Johnson distributed union literature. Smith and Kusinsky signed authorization cards in the presence of other employees. Immediately thereafter, as Lawhorn and Johnson were leaving the site, Gutierrez told Smith that Sam Fuji had instructed him to let Smith go right now as, according to Smith, "Sam did not like me calling him during business hours and asking for a raise." Smith asked if he might be rehired, and Gutierrez said that he didn't think so. Gutierrez also told Smith that he had recommended to Fuji that he liked Smith's work and wanted Smith to remain until the end of the project. Smith packed up his tools and left the site, and thereafter had no further contact with Fuji Electric.

James Kusinsky had applied covertly with CLP in October 1994. He was phoned by Ingersoll a few days later and was told that CLP was having a problem locating one of his references. Thereupon, Kusinsky had the bogus reference call CLP and corroborate the false information he had included in his application; he was thereafter found eligible for employment. His first assignment was to Fuji Electric, where he began working on October 13, 1994. According to Kusinsky, Peter Smith had also been sent out to Fuji Electric that day by CTI. After a few days on the job, Kusinsky was told by the foreman, Gutierrez, that he and Smith were doing good work, and that there would be 5 to 7 weeks of employment.

On October 19, 1994, Smith wore a union T-shirt to work. He talked with the other employees about the benefits of belonging to the Union, and passed out literature and authorization cards. Kusinsky testified that Smith's lengthy talk to the employees about what the Union had done for him was very convincing and that Smith was persuaded to sign a union authorization card as he thought the Union was a great idea. In fact, the next day, Smith asked him if he would like a raise, and Kusinsky readily agreed. Kusinsky corroborated Smith's testimony that Guiterrez gave Smith permission to phone Sam Fuji and request raises for the employees; Gutierrez believed that he, too, was entitled to a raise, and seemed very interested in the Union.

Kusinsky testified that he was present when Gutierrez laid off Smith, and that when Smith asked Gutierrez why he was being laid off, Gutierrez replied, "I don't know why Sam's firing you." Gutierrez asked for Smith's CTI timecard as he had to sign it so that Smith could return it to CTI. Smith then again asked why Fuji Electric was getting rid of him, and again Gutierrez said that, "[t]his is what Sam said." After Smith left the site, Kusinsky asked Gutierrez why Smith had been fired, and Gutierrez said that Sam Fuji wanted to terminate him because he was asking for raises and trying to organize Fuji Electric. Kusinsky asked if Gutierrez would be needing more help on the job, and Gutierrez said, "[Y]es." Thereafter, Kusinsky brought in his friend, Jeff Clark, who was wearing a union T-shirt, to apply for work. Guiterrez, in the presence of Kusinsky, told Clark that he would hire him, but cautioned him not to mention his union affiliation, as Sam Fuji had already fired someone else for being union.

On the afternoon of October 25, 1994, Kusinsky told Guiterrez that he would not be coming to work the next day as there was a court proceeding, involving someone else, that he needed to attend. However, on the morning of the next day, October 26, 1994, Kusinsky went out on strike against Fuji. The Union, on Kusinsky's behalf faxed the following letter to Fuji: "This is to inform you that I, Jim Kusinsky, am on an Unfair Labor Practice Strike as of 10/26/94 due to violations of workers rights under the National Labor Relations Act. I have not quit my position with the company. I am on strike." Kusinsky testified that he engaged in the strike because Smith had been unlawfully discharged, and because he and Jeff Clark had been intimidated and threatened by being told by Guiterrez that Smith had been terminated because of his union affiliation.

On November 7, 1994, a letter was sent to Fuji Electric on Kusinsky's behalf requesting unconditional reinstatement. On the same day, Kusinsky phoned Sam Fuji and said that he was ready to return to work. Fuji told him that he would have to call CLP, and that Fuji could not put him back to work as he was a CLP employee. Thereupon, Kusinsky phoned CLP and spoke with Ingersoll. He told Ingersoll that he was unconditionally offering to return to work from his ULP strike. Ingersoll, according to Kusinsky, said that "[y]ou abandoned your job and you told Edwin [Guiterrez] that you were going to court and that you no longer worked for CLP."

Martha Fuji, the wife of Sam Fuji, is vice president of Fuji Electric. She is not involved in the hiring or firing of employees; rather, her husband makes those decisions. Martha Fuji, who spoke rather halting English, when initially asked why Smith was discharged, testified that "because he was telling . . . the other employees to get raises from the hourly [sic]." Martha Fuji testified that Smith had called the office and asked Sam Fuji for more money for all the hourly employees. Thereupon, Sam Fuji phoned CTI, Smith's temporary employment service, and CTI told Sam Fuji to dismiss Smith. Martha Fuji did not know whether her husband told CTI that he no longer wanted Smith to work there.

Osamu (Sam) Fuji is owner of Fuji Electric. Fuji testified that one day Smith, an employee of CTI, phoned him and said he needed more money and wanted a raise. According to Fuji, it was not a mere request but was "like demanding a raise," and

Smith may have said that he was asking for raises for the other employees, although Fuji is not sure about this. Fuji testified that he found Smith's request somewhat humorous, as Smith was an employee of CTI, and he told Smith that working time was not a good time to talk about raises. After the conversation, however, he realized that it would be of no use talking to Smith about raises as Fuji Electric had nothing to do with Smith's wages. Fuji then called CTI and asked what he should do. The CTI representative, James, told him to tell Smith to report back to CTI. Thereupon he beeped Gutierrez and told him to have Smith report back to CTI. He did not indicate to Gutierrez why Smith was being sent back, and "doesn't think" he told Gutierrez, "[A]nything about you don't want people on the job who are organizing for the union." Fuji testified that he didn't know that two union organizers, Lawhorn and Johnson, had been on the site talking with the employees about the Union and, although he testified that he didn't know that Smith wore a union T-shirt or that he handed out union literature on the job, he also testified that "[s]ome employee reported to my wife that Smith handed out papers and stuff." Gutierrez has since quit his employment, and is no longer working for Fuji Electric; he did not testify in this proceeding.

Sam Fuji testified that Kusinsky was hired through CLP. Kusinsky called the office one day and told Sam Fuji that he had to go to court the next day and would be unable to come to work. Fuji told him to report this to Gutierrez, and he assumed that Kusinsky did so. Later Fuji got a letter from Kusinsky stating that he was going on strike. Sometime thereafter Kusinsky said that he was ready to come back to work. Fuji never knew there had been picketing at the site, as this was not reported to him. When Kusinsky called Fuji about returning to work, Fuji told him that CLP had sent a replacement and that the project was almost at an end and Smith's services were not needed. He also told Kusinsky to talk to CLP because CLP was his employer.

Scott Ingersoll testified that he recalls that Kusinsky, who had been working for Fuji Electric, came in to CLP's office on a Friday to receive his paycheck. Ingersoll asked him whether he would be returning to Fuji Electric the following week, and Kusinsky said no, that he had gotten a job earlier in the week working for Piper/Hart Electric. Ingersoll made a note of this on a notepad, for insertion in Kusinsky's telcom file at the end of the day. Ingersoll testified that Kusinsky said nothing to him about being on strike against Fuji, or that this was a reason why he was not returning to Fuji.

That evening Ingersoll accessed Kusinsky's computer file and noticed that there was an entry, dated October 26, 1994, stating that Kusinsky had notified Fuji Electric's foreman that he would not be at work on the following day because of a court appearance. Ingersoll looked at the Fuji Electric order and saw that Fuji had requested an electrician for 3 weeks, and Kusinsky had been on the job for only 9 days. What had actually happened, according to Ingersoll, is that Kusinsky had not fulfilled his obligation to CLP, as he had abandoned the Fuji job without notice in order to go to work for another contractor. As a result, Ingersoll disqualified Kusinsky from further work referrals, and noted this in his computer file.

About a week later, according to Ingersoll, Kusinsky called in for a new job assignment. Ingersoll accessed his computer file and told him that unfortunately CLP would no longer be able to offer him work because he abandoned the Fuji Electric job without notice. Kusinsky became "animated," and said that he didn't quit the job, rather he was on strike. Ingersoll replied that this was the first he had heard of a strike, and that he had not been so informed by anyone, and that Kusinsky's conduct in abandoning the job without notice for the purpose of taking another job was unacceptable and constituted a violation of his conditions of employment. Kusinsky would not accept Ingersoll's reasoning and kept asking Ingersoll whether he was "terminated" by CLP. Finally, Ingersoll understood that Kusinsky wanted him to agree that he had been terminated, and said yes. This satisfied Kusinsky, and he said thank you and hung up.

b. Analysis and conclusions

I credit the testimony of Sam Fuji, and find that as a result of his being contacted by Peter Smith he phoned CTI, Smith's employer (not a party to this proceeding), and advised CTI of Smith's attempts to negotiate a wage increase for himself and perhaps for the employees of Fuji Electric. As a result, Sam Fuji was told by the CTI representative to have Smith report back to CTI. Thereupon, Sam Fuji notified his job foreman, Guiterrez, to tell Smith to report back to CTI.

The testimony of Smith and Kusinsky is contradictory. Thus, according to Smith, Guiterrez told him that he was being laid off because, "Sam did not like me calling him during business hours and asking for a raise." In contrast, according to Kusinsky, when Smith asked Gutierrez why he was being laid off, Gutierrez replied, "I don't know why Sam's firing you," and thereupon asked for Smith's CTI timecard as he had to sign it so that Smith could return it to CTI. Smith then again asked why Fuji Electric was getting rid of him, and again Gutierrez said only that "[t]his is what Sam said."

The testimony of Sam Fuji appears to comport with reasonable probability, namely, that upon being confronted with a request for a wage increase by an employee of CTI, he would send the individual back to CTI as he was not Smith's employer for such purposes. This, I find, is what CTI requested him to do, and therefore Sam Fuji had no need to discharge Smith in order to comply with CTI's instructions. Moreover, it was Smith who wanted to discuss wages on his own working time, and the fact that CTI wanted him sent back to CTI during the workday for such discussions seems reasonable. The testimony of Martha Fuji, who has some difficulty with spoken English and was not directly involved in the incident, appears to be consistent with that of her husband, Sam Fuji. As the testimony of Smith and Kusinsky is not consistent regarding the alleged discharge of Smith, I am hesitant to credit either for any purpose. Accordingly, I shall dismiss the allegations of the complaint pertaining to Fuji Electric.

I credit the testimony of Ingersoll, and find that Kusinsky abandoned his job with Fuji Electric in order to take a job with another employer. Clearly, such conduct is inimical to the business operations of CLP and employees are clearly advised that appropriate notice is necessary prior to leaving a job in order to preserve their opportunities for further employment.

Moreover, I credit Ingersoll and other CLP representatives that this policy is strictly enforced; there is no evidence to the contrary. Accordingly, I shall also dismiss this allegation of the complaint.

6. Organizing strategies

a. IBEW Local 441[27]

The Union publishes and distributes to its members a quarterly newsletter, called "IBEW Four Forty One." The newsletter contains a variety of information, including articles regarding electrical work being awarded union contractors within the Union's jurisdiction, and articles regarding the successes of its ongoing campaign to battle nonunion contractors. In an article by the business manager appearing in the January/February 1994 newsletter, it is stated that "[t]he economy in Orange County has been terrible and most economists agree we have been in a recession since July of 1989 . . . there just is not enough building going on . . . we are in a battle for survival with the non-signatory contractors." The article goes on to acknowledge the "efforts of about 200 of our members who have been involved in our organizing, salting, handbilling, and picketing campaigns this past year," and continues as follows:

> Through the efforts of those of you involved with the many programs we are using to combat the non-signatory contractors, 1993 was a success.
>
> 1993 saw the demise of some of the very largest non-signatory contractors. They are no longer in business, or no longer a force in our jurisdiction. If we add this to the medium and smaller non-signatory contractors who are no longer in business, we can be proud of the effort of this membership and its *organizing program*. [Emphasis added.]

Virtually all of the newsletters stress the importance of the Union's salting program, and enlist membership participation and support for this program. Articles in various newsletters give insight into various purposes of the salting program. Thus, Union Vice President Vaughn Hedges wrote in an article appearing in the Oct./Nov./Dec. 1992 issue that "[s]everal people have been successfully involved in the salting program, myself included . . . we must go out and talk to nonunion electricians and invite and encourage them to join us in our noble efforts. We must tell them what we can all gain by standing together." In the April/May 1993 issue, an article written by the then business manager states that:

> Some of the biggest non union contractors have closed their doors . . . [and] no longer threaten to destroy our wage rate. . . . Several smaller non union shops are out of business or closing their doors because our members have taken jobs as salts, and discovered how these petty crooks were cheating, not only their workers, but the taxpaying public as well . . . after our salts have learned the facts we take the case to the appropriate government body, and stay with it until the contractor is forced to play by the same rules as our contractors . . . as the cheaters are forced out everyone will benefit.

The summer 1995 newsletter, in an article written by Business Manager Doug Saunders, states:

> Many members are working off the book and Salting, to keep a steady income and it is working.
>
> Due to membership involvement, 441 continues to lead the Ninth District, the U.S. and Canada in charges filed with the national Labor Relations Board and currently has over 40 cases in various stages of progress. These are charges against non-union contractors who have been flagrantly violating the law.

An article by the business manager in the March/April 1995 newsletter, states, "The Organizing, Salting, and job targeting programs have dealt devastating blows to non-signatory groups nationwide, and they are waging an all-out effort to destroy these programs the IBEW has put together." And in the January/February 1995 newsletter, the business manager writes, "The salting program here has put a crimp on many of the non signatory contractors and business operations here in the County the past few years, but we must continue and even increase our efforts."

The summer 1995 newsletter contains an article entitled, "Local 441 Stands Proud," inter alia, as follows:

> It has been announced by International Representative Cecil Wynn that Local 441 leads all locals in the United States and Canada in filing unfair labor practices against non-signatory contractors. This is quite an achievement given the fact that 441 is nowhere near being one of the largest locals in the country and the difficult nature of roaming non-signatory contractors in at least five counties in Southern California.

Since about 1991, the Union has targeted CLP for salting activities. The Union maintains a current list of those nonunion contractors it is targeting and usually gives the member the option of applying at one of several employers. Union members have been authorized by one of three union representatives, either Doug Saunders, David Lawhorn, or Claude Johnson, to submit applications to CLP. Union members are not permitted to seek work with nonunion contractors unless specifically given such permission, and in exchange for this permission they are required to comply with any instructions given to them. Thus, they must engage in salting activities, and must quit their employment or go on strike as directed.

It appears that for the most part union members are given the option to apply either overtly or covertly, although they may be directed to apply one way or the other so that the employer's propensity to hire union or nonunion employees may be discerned, frequently for the purpose of supporting charges of discrimination against union members. Those who apply overtly give truthful information regarding their union apprenticeship training and employment history, including wage rates and references. Such information clearly establishes their union affiliation; thus, having completed the Union's apprenticeship training program, and having received union wages while working for union contractors, a prospective employer reviewing the application may readily infer that the applicant is a union member.

[27] In this section of the decision IBEW Local 441 is referred to as the "Union."

Those who apply covertly give falsified information for the purpose of causing the prospective employer to believe that they are not union members. This false information is provided to the members from a data file maintained by the Union, and the member may either be furnished with a complete resume containing the false information or may assist in preparing such a resume, which is then used in the application process. Such resumes falsely list nonunion employers and nonunion wage rates, do not give truthful information about the employee's union-sponsored apprenticeship training, and give bogus references. With regard to the references, some are contractors that no longer exist or never existed, some are existing contractors who have agreed to cooperate with the Union and provide untrue or partially true information regarding a particular individual, and some are actually union representatives who operate a "sting line" out of the union hall.

This sting line, as it is called by the union representatives themselves, operates as follows: The prospective employer conducts a reference check by phoning the references listed by the applicant; the phone number is actually a line at the union hall answered by an answering machine with the recorded request that the caller relate the purpose of the call and leave a phone number. Thereupon, a union representative returns the call, falsely identifies himself as the named contractor, and provides bogus employment information and a highly favorable reference.

While some covert applicants testified that they feel uncomfortable engaging in such practices, nevertheless they justify this conduct by rationalizing that it is necessary in order to obtain employment with nonunion contractors who would not otherwise hire them, and, further, that such falsifying of their background is not deceptive as they are well qualified to perform the work required of them and thus a true accounting of their prior experience should not be relevant.

The Union's ongoing salting program is a matter of general knowledge among union members, and they frequently "volunteer" to work for nonunion employers in order to obtain temporary employment when it appears that union jobs are not readily available or they are low on the Union's out-of-work list and may not expect to be dispatched to a job for a period of time. Some union members are admittedly uncomfortable with salting activities and the extent of their assistance to the Union, if any, may be simply to provide information regarding the nature of the nonunion contractor's work and the number of employees on the job. Other more zealous and committed union members may engage in more active salting activities, such as speaking with nonunion employees on the job regarding the benefits of unionization, and attempting to interest them in becoming union members.

A small group of members are indeed "professional" full-time salts and enjoy the challenge of conspicuously announcing their union affiliation and their intention to organize, and of thereupon confronting contractors with wage and/or other demands on behalf of themselves and one or more employees, who, in fact, may be fellow covert salts planted on the job for that very purpose. Many such salts become employed by the Union as organizers after they have demonstrated their salting abilities. Thus, the union member may decide that he likes the challenges and opportunities presented by salting, and thereupon demonstrates his expertise on-the-job. Customarily, this translates into the ability to generate unfair labor practice charges against contractors. When an individual demonstrates such effective salting techniques and requests that he be paid for his efforts, the Union may agree to make up the difference between journeyman scale and what he is being paid by the nonunion employer; and, additionally, he continues to receive journeyman scale when he is engaging in a strike or even when he is unemployed but actively pursuing other salting opportunities. These paid salts work very closely with the aforementioned union representatives.

Robert Brummal applied overtly with CLP in May 1993, truthfully listing his prior union experience and references. He was hired by CLP and subsequently assigned to several jobs. Brummel testified that he had been out of work for awhile and that his then Assistant Business Manager, Doug Saunders, gave him permission to work for nonunion contractors and gave him a list several nonunion contractors from which to chose. Saunders told him to remember that he was representing the IBEW and to go out and do the job to the best of his ability; he was not told to report back to the Union. His purpose for so obtaining employment was to earn a living, and it was not for organizing or salting as far as he was told. However, Brummal testified that he talked with the Union some three or four times about CLP's application process, and that Saunders asked him questions about the job he was referred to: how big it was, how many men were working, what stage it was in, and who was doing the work. Upon being offered further work by CLP with Aztech Electric he declined it, stating that he was going on vacation, and immediately phoned Union Vice President Hedges to advise him that CLP was looking for electricians to send to Aztech Electric.

Paul Yontz testified that he began salting for the Union prior to the time he became a union member.[28] He joined the Union in August 1991, and at the same time became a paid organizer. Yontz testified that at times there have been as many as 50 active salts utilized by the Union. Yontz sees it as part of his job to drive up the costs of nonunion contractors. For example, according to Yontz, nonunion contractors will attempt to cut costs by failing to comply with Occupational Safety and Health Administration (OSHA) safety guidelines, and he will attempt to insure that such matters are rectified or reported to appropriate agencies.

Yontz claimed that although he has intended to remain permanently at each salting job he has accepted, nevertheless this never occurs because when he begins organizing the workers he is routinely run off the job within about a week. About 15 unfair labor practice charges have been filed on his behalf by the Union, as salts are not permitted to file such charges on their own. He has gone out on strike on about 10 jobs, and believes that each of the strikes was for the purpose of protesting unfair labor practices. On only one of these strikes was he joined by an employee who was not himself a salter. On each occasion, after striking, he made it a practice of sending the contractor a

[28] I have previously found that CLP was justified in disqualifying Paul Yontz for further employment.

letter, within a week or so, stating that he was unconditionally requesting reinstatement to his former position. He would send such letters despite the fact that in no instance was there a resolution of the dispute over which he purportedly struck; thus, he ended his strike although the "problem" continued to exist.

On only 1 of the 10 occasions did he go out on strike because he was fired; on the 9 other occasions he struck because he was "feeling upset with having my rights violated," and at the time he struck he didn't "know when I'm going to feel like returning to work." He has received backpay in settlement for two of the ULP charges filed in his behalf; one settlement amount was $4000, and he is not permitted to disclose the amount in the other case pursuant to the terms of the settlement. On about five of the jobs he has salted he complained to management that he and other were not being paid enough, and on four other jobs he complained to management about working conditions. On each occasion he would approach management with these requests during his working time, and such attempts to improve employee wages or benefits were always unsuccessful.

Yontz' salting activities have not resulted in bringing any new members into the Union; no contractors have become signatories to union contracts as a result of his efforts; and the Union has filed no representation petitions requesting an NLRB election. Nevertheless, according to Yontz, he believes he is an effective salter because, "I go out and I educate a lot of people. I get a lot of people interested. That's my main goal. . . . It is education: I'd like to see everybody find out the things that I have learned about the benefits of being a union member regardless if it succeeds in their becoming a member or in their being covered by a union contract."

Vaughan Hedges was vice president of the Union from June 1992 to May 1995. From May to October 1994 he was employed by the Union as an organizer. He described his job as an organizer as follows: "to help out-of-work union members get employment with non-signatory contractors so that they would have the opportunity to talk to their men about the benefits of the union." It was a full-time job and his salary was the same as journeyman wireman's wages.

In November 1992, Hedges answered a CLP newspaper ad for electricians, and applied covertly. Although Hedges did not know of any overt union applicants who had been refused employment by CLP, he nevertheless feared that he would not get a job if he listed his prior union employers. Upon becoming a salt he was told by Business Representative Saunders that if he felt his rights were being violated by a nonunion contractor he could go out on an unfair labor practice strike and then offer to return to work, and that an employer's refusal of this offer would generate a ULP charge. He has gone out on strike three or more times during his salting career, and on these occasions has remained on strike for a week or two.

Hedges testified that on one of these occasions a coworker and fellow salt, Mike Kaspar, came up to him and said that he felt their rights had been violated and solicited Hedges' support; Hedges pledged his support in the endeavor. The problem, according to Hedges, was that he and Kaspar were being denied further access to speak with the owners about either wages or benefits. Thus, the two had asked their foreman for permission to speak with the owners, and struck because such permission was denied. Conveniently, they happened to have "unfair labor practice" picket signs in their truck at the time, as Hedges had made up a bunch of them to be used by salts who could pick them up at the union hall. He and Kaspar were given authorization to engage in this conduct on their own, without specific permission from union officials. They remained on strike a week or two, but only picketed intermittently, sometimes together and sometimes separately. After offering to return to work and being refused, unfair labor practice charges were filed on their behalf over the contractor's failure to reinstate them.

Hedges considers himself to be a good salter because "I've got a good story to tell the guys about my life and how the union changed it." He believes that as a result of his efforts "there are a lot of guys out there who have a lot better understanding of what the union and the labor movement are all about." He testified that on two jobs he got a majority of the employees to sign cards, but he does not know if there have been any election petitions filed as a result of his salting. Sometimes he would carry a tape recorder to record conversations of foremen and bosses, but did not record private one-on-one conversations as this would be unlawful.

Three of the unfair labor practice charges filed on Hedges' behalf have resulted in settlements; none of the charges have resulted in an NLRB hearing.

Scott Ingersoll, CLP's Anaheim branch manager, related the following incident regarding Paul McPhail, an employee. On one occasion Ingersoll had reluctantly told McPhail that one of CLP's customers was dissatisfied with McPhail's work performance and that he was being dismissed from that job as the customer had requested a replacement. At this point, according to Ingersoll, McPhail became extremely upset, "just like someone set off a bomb underneath him," and he said that it was impossible that anyone could be dissatisfied with his work as he was the "best conduit person in the valley." Ingersoll said that the customer didn't seem to feel that way, but that this did not reflect upon how CLP felt about him; on occasion employees get bad reports, and CLP could send him to another contractor.

McPhail said that he was going out to the jobsite to confront the foreman and ask him why he didn't like McPhail's work. Ingersoll asked him not to do that because it would disrupt CLP's relationship with the customer and was not appropriate, and that Ingersolll would try to gather more information regarding the customer's reasons for dismissing McPhail. McPhail contended that the contractor was discriminating against him because of his union activities at the jobsite, and Ingersoll told him that the contractor had not mentioned McPhail's union activity. Then McPhail said that he was going out to the jobsite to videotape the work he had done, and Ingersoll told McPhail that he should only do so if accompanied by Ingersoll, and that he should think about it overnight. Ingersoll called the customer that night to prepare him for the possibility that McPhail would go to the jobsite himself, directly against Ingersoll's instructions. The next day McPhail did just that, accompanied by a union representative and, according to reports from the customer, the two were very disruptive and refused to leave the premises.

Later that day McPhail called CLP to ask for another job, and said he was going to sue the contractor's foreman for assaulting him and trying to shove him off the premises. McPhail was very threatening toward Ingersoll. Further, McPhail had called another CLP manager, Frank Palmadesso, and related that he was on his way to the Anaheim office to get his paycheck and was "bringing a bunch of his union buddies with him." As a result Palmadesso, fearing a confrontation, came over to the Anaheim office to offer support for Ingersoll. When McPhail entered, he and Palmadesso got into a loud discussion, during which McPhail was attempting to provoke Palmadesso by saying that Palmadesso had bad breath and crooked teeth and said he should get braces and brush his teeth more. During this visit, McPhail had a tape recorder and was recording parts of the conversation. Finally he left the office and, according to Ingersoll, may have called in for work on one or two occasions thereafter.

Ingersoll testified that on another occasion, during a scheduled interview session, a group of IBEW Local 441 members entered the office. One person was filming with a video camera as they came through the door. Ingersoll asked what the video camera was for and someone said, "[F]or your protection and for ours." They sat down and Ingersoll started the orientation process. Ingersoll asked Branch Manager Frank Palmadesso about the matter and was told that he didn't have to let them film in the office and could ask them to take the camera out of the office. They filled out applications and when it came time for the oral presentation he told the individual with the camera to take it out of the room. He refused to do so at first, saying that it was not harmful, and Ingersoll said he would not proceed with the orientation until the camera had been removed. Finally, the individual said that the camera was off, but Ingersoll continued to insist that it be removed from the office. It was very obvious to Ingersoll that the group was trying to intimidate him and to disrupt the orientation process during which a number of other applicants were present for the purpose of obtaining work.

In September 1992, Shawn Smith was told by Business Manager Doug Saunders to apply with CLP. He applied covertly, and was offered employment. He had formerly been a member of the Union herein, but was then a member of IBEW Local 11, although he was receiving salting instructions from Saunders. His own Local brought his nonunion wages up to union scale to compensate him for his salting activity. He believes he has salted about five jobs, although he is not certain as to whether four of these jobs were truly salting situations, and speculates that perhaps the Union was just attempting to subsidize him because he needed the money. He is aware of only one ULP charge that has been filed on his behalf as a result of his salting activity.

David Barber was told by Business Representative Lawhorn in October 1994, to answer CLP's ad in the newspaper. Barber applied covertly, as he had heard from others that it was difficult for a union member to get hired by a nonunion contractor. Lawhorn assisted him in preparing a bogus resume, and he used this to copy from while filling out the CLP application. The union sting line was successfully used during CLP's reference check of Barber. He was employed and sent to several jobs. On December 2, 1994, while employed by CLP, he disclosed his union affiliation by wearing a union T-shirt on the job, and began distributing union literature. The job ended on December 9, and the whole crew was sent back to CLP. Thereafter, he was contacted by CLP and offered further employment, but did not accept it.

Barber testified that CLP was the first and only contractor he had actually salted, as he had not been hired by two other prospective employers with whom he had applied overtly; however, no ULP charges were filed as a result of this. Barber testified that he agreed to become a salt as he needed a job and was not permitted by the Union to work for nonunion contractors without salting. He understood that the Union could request that he quit the nonunion employer at any time and testified that if the Union so insisted, he would comply.

Simon Zeller applied covertly with CLP and was offered employment. He was sent out to several jobs but did not try to engage in any organizing as he was only employed for a short time.

Michael Kaspar began salting in May 1994. The Union supplements his wages and benefits when he is working or seeking work from nonunion contractors. He applied covertly at CLP on about July 13, 1993. He was accepted for employment and thereafter turned down a succession of job offers, accepted one job, and then quit for a higher paying job. On October 13, 1994, he was offered a job by CLP at Sun West Electric that was scheduled to last for several weeks. He was to report to Sun West Electric the following morning but did not because, "Due to what I saw as employees being discriminated against with known union affiliation by CLP I decided to go on an unfair labor practice strike in support of those workers who were being refused work." He gave no notice to CLP that he was going on strike, and he and Claude Johnson, union organizer/business agent, went to CLP's branch office and carried picket signs that read, "[U]nfair labor practice strike against Contractors Labor Pool." They picketed "maybe 30 minutes" in front of office, then left as no one was there. Kaspar claims that the picketing was in protest of the fact that a fellow salt, Vaughn Hedges, believed Hedges had been discriminated against by CLP because of his union affiliation. While this had allegedly occurred sometime in the past, Kaspar denied that he had accepted the job at Sun West knowing that he would not honor his commitment to report to work. Rather, Kaspar testified that, "I accepted that job for the purposes of feeding my family. It wasn't until after I had accepted the job I began to think about what they had recently done to a number of other union members." It was his plan to stay out for awhile and then offer to unconditionally request reinstatement; this is his regular practice in all strike situations, and he routinely requests reinstatement even though the underlying problem over which he allegedly struck has not been resolved.

Claude Johnson has been a business representative and organizer for the Union since April 11, 1994, and has been vice president of the Union since July 1995. Johnson has engaged in salting activities from March 1993 until about September 1994, and has been hired by about 7 to 10 contractors. Johnson has engaged in four unfair labor practice strikes, which always result in his submitting an offer for unconditional reinstatement

regardless of whether the situation has been satisfactorily resolved. As a result of one prior NLRB hearing he has received about $2500; and in another case which, pursuant to the terms of the settlement he is precluded from revealing, he received an additional amount.

Johnson testified that the Local 441 Electrical Industry Advancement Program is an industry fund that deducts 2 percent from the employees gross wages and is used for various purposes. Moneys from this fund are used to subsidize union contractors and to give them a competitive edge against nonunion contractors by permitting them to submit lower bids on jobs and pay wages that are lower than union scale, the difference being made up by the Union.[29] In addition, moneys from the fund are used to finance salting activities and to pay organizers.

David Lawhorn is a business representative and organizer for the Union. He has attempted to salt about 10 jobs but has never been hired. As a result he has filed five or six ULP charges alleging discrimination as a result of his union activity.

Lawhorn testified that within a period encompassing all of 1994 and an indeterminate portion of 1995, the Union has filed as many as 40 unfair labor practice charges with Region 21 of the Board. He stated that in his opinion the Union's salting activities have been successful because since 1992 there have been about 10 contractors that have signed contracts with the union. During this period there have been no election petitions filed by the Union, and in only two or three of these instances did salts obtain a majority of cards. Regarding some of the aforementioned contractors who became signatory to contracts with the Union, it was Lawhorn's belief that they signed because of the Union's filing of unfair labor practice charges. Thus, Lawhorn testified that "I think pointing out the violations that the contractor was involved in," may have induced the contractors to sign agreements with the Union, but he did not know whether the contractors' intention was to mitigate the monetary liability resulting from their own violations of the Act. However, at another point in his testimony, Lawhorn testified that he "doesn't have an idea why these contractors on salted projects sign with Local 441."

Lawhorn testified that in discussions with union members he always counsels that they have an option to engage in an unfair labor practice strike if they believe their rights or the rights of others have been violated; it is the salt's option. He purposefully refrains from directing such strike activity so that the Union will not bear responsibility or liability for the strike. Thus, the salts usually come in and let him know what they wish to do, and Lawhorn assists them in this endeavor. However, Lawhorn acknowledged that it is an established practice for salts to unconditionally offer to return to work after they have been out on strike for awhile. Regarding their salting activities, he counsels them that they may engage in concerted activities as they choose, and need not limit their activities to nonworktime; rather, they may also engage in such activities during working hours if so permitted by the contractor. Thus, he has never instructed a salt one way or the other about stopping work to go talk to a foreman or representative of management about wages, benefits, or anything else, provided that the salt was supported by coworkers in this activity and was not acting individually.

Lawhorn testified that in about September 1995, 2 weeks after the commencement of the instant proceeding, during a two-district organizing meeting in Las Vegas, he spoke to an assembly of some 200 representatives about the fact that CLP was the object of an ongoing salting campaign and that the Union was currently engaged in litigation with CLP. At that time it was suggested by an unidentified representative, apparently not a representative of IBEW Local 441, that the various locals join forces and send applicants to all the West Coast branch offices of CLP.

Lawhorn has taught salting classes, and he has been an instructor for more than 10 COMET (Construction Organizing Membership Education and Training) classes. Union members are encouraged to take such classes. At COMET, classes members are provided with general information regarding the state of the union movement: facts regarding the proliferation of nonunion contractors; why organizing is of predominant importance; and the benefits that such organizing activities provide to the members. Salting classes, taught by Lawhorn and Saunders, among others, focus upon specific organizing tactics and methodology.

Regarding the Union's suggestions to salts that they generate unfair labor practice charges and engage in unfair labor practice strikes, the testimony of Paul Becker is instructive. Applying covertly, Becker obtained a job with a nonunion contractor, AC Electric. After a short time he notified Business Representative Johnson that he would be quitting his job with AC Electric because his former union employer, Briggs Electric, had called him back to work beginning the following day. Johnson told him, according to Becker, "There have been people that that company, AC Electrical [sic], refused to hire because of their union affiliation. I want you to notify AC Electric that you are going to go out on strike against them and you're going to file unfair labor practice charges because of their refusing to hire those people. And then you can go back to work at Briggs Electric." Becker complied, although he didn't know anything about AC Electric's alleged hiring policy. The following morning he went to the AC Electric jobsite and, in the absence of the jobsite foreman, told an apprentice, the only individual at the site, to relay the message to the foreman that he was "filing an unfair labor practice" because "the rights of myself and others had been violated by AC Electric," and that he was not coming back to work as he was going out on strike. Thereupon, according to Becker, he simultaneously engaged in an unfair labor practice strike and returned to work for his former employer that same day.

In about mid-1994, Ronald Staley, who was not yet a union member, was working on a job that had been salted by the Union. He became interested in the Union's salting program, apparently as a result of being solicited by Kaspar. He phoned the Union and thereafter met with Union Representative Lawhorn and Organizer Kaspar. Lawhorn, whom he understood

[29] Certain such activities have been determined to be "illegal kickbacks" under both Federal and State law. *Electrical IBEW Locals 11, 302, 340, 441, 569, 595 v. Aubry,* 41 Cal.App.4th 1632, 49Cal.Rptr.2d 759 (1996) (citing *Electrical IBEW v. Brock*, 68 F.3d 1194, 1202–1203 (9th Cir. 1995).

was the Union's main organizer, gave him a paper stating that salts were "to do exactly what their organizer told them to do, to strike or to do concerted activity . . . whether it was to . . . get charges or talk to the workers, whatever."

Following this initial meeting, Staley became a salt for the Union and had conversations with Lawhorn sometimes as often as three times a week over a period of a year. To summarize these conversations, according to Staley, Lawhorn told him at various times that one of his objectives as a salt was "to get charges on the employers so we can run up the costs of the job . . . creating charges will run up the costs to the employers at the job because they've got to hire attorneys to do exactly what we're doing here today."[30] Lawhorn told him to "Get charges, go on strike, do not walk off the job unless you get charges first . . . never walk off the job, always strike first." Staley was advised that on any job that was nonunion it was mandatory that members work as salts; otherwise they wouldn't be permitted to work on those jobs at all. Further, after striking, if things got slow and Staley was unable to find another salting job within a few days or so, he was advised that the Union would write up a letter unconditionally requesting reinstatement, "on a pretense that we hope they don't hire us back because we'd go on their payroll as of that minute, because they told me that it was the law that they had to hire us back immediately. . . . We hope they don't, right, that way we'd incur some money."

Regarding concerted activities, Staley testified that Lawhorn told him, "Do concerted activity . . . ask for raises, ask for benefits for our family and the workers and other—things to ask for—he would say to ask for anything, you know, just ask for anything. . . . Ask for two-hour lunches, whatever, just ask for anything." The point of such concerted activity, as explained by Lawhorn, is that "[i]t would antagonize the foremen or the owners of the company or whoever might be a supervisor." He was also instructed to watch what other, more experienced, salts do, and see how they go about salting so that he could learn their tactics.

Staley testified that he worked as a salt with four or five more experienced salters, including Mike Kaspar. Lawhorn, Johnson, and Kaspar told him that he could engage in concerted activity at any time, including working hours. Lawhorn told him that he could "go over to the supervisors anytime, go up to them and say, 'Hey, we want a raise,' or 'Hey, we want benefits,' or 'We want you to buy us our tools or screwdrivers,' or 'Hey, these ladders are—[unsafe]' whatever, you know, just ask them for anything at anytime we want to."

After becoming acquainted with the Union's methods, Staley advocated a different approach and, as in his opinion some of the salts were not working "up to par," suggested that union members demonstrate that they were the better electricians: "Let's do by showing"; "Let's kick ass, let's show them we're the better electricians, showing by example." However, according to Staley, this was not acceptable to the others, and on occasions when Staley would bring this up during the course of discussions, Lawhorn, Johnson, and Kaspar would respond that "[w]e are not there to build their God-damn job." Generally, in conversations with Kaspar and "maybe a couple other guys . . . it was more of a thing like, 'If we can't get the workers, bankrupt the contractors.'"

Staley was told by Lawhorn, Johnson, and Kaspar that "[i]f I come up to my foreman and say, hey, I want a raise and I want benefits for my family, and he says, hey, get back to work, you know, tells me to get back to work or whatever, and then I say, well, I want to go use the telephone to call the owner up and ask him for this if you're not willing to give me an answer, and then he still refuses, tells me, no, get back to work, my understanding was and what I was told that that's a violation of rights and you can get ULP charges for that." Staley testified that he did not use this telephone routine, apparently feeling that it was unacceptable and a misuse of the contractor's time and money. He was told that "[making] telephone calls to a contractor's office any time [he] wanted to . . . was part of concerted activity," and he was taught that such activity was legal. And, according to Staley, "[I]f you've got charges you can go on strike." Staley did not recall any instructions to slow down the work, but testified that "we did a lot of concerted activity so that took up pretty much a lot of the day sometime."

On one occasion, Lawhorn ordered a union member to leave a job. The union member was not a sanctioned salt but was just on the job because, according to Staley, he said he had a hard time paying his bills. Staley explained this to Lawhorn, and Lawhorn instructed Staley to "go in there and get him and tell him to come out and go on strike with us." Staley argued with Lawhorn about this, stating that the individual needed the income, and Lawhorn insisted that he leave the job because he accepted the job without first checking in as a salt. Thus, the member was required to leave the job against his wishes.

Staley testified that during his salting career he spoke with perhaps 50 nonunion employees about the benefits of the Union, and only one of these individuals, who happened to be a friend of Staley's, joined the Union; the others were not interested.

Staley testified that he resigned from the Union in the middle of 1995, feeling that he, in effect, had been forced out "because of unethical practices that I felt they were asking from me." The only conversation he had with Doug Saunders took place in late 1995, after Staley had withdrawn from the Union, when Saunders and Johnson came out to a jobsite to serve him with a subpoena. Saunders asked whether Staley would like to come back into the Union. Staley said, "[N]o." They had a brief conversation regarding salting, during which Staley apparently indicated his disapproval of certain activities, and Saunders said, "Well, we're out there to increase their costs of these jobs . . . to the contractors."

According to Staley, some salts, including Kaspar, were paid for salting. Staley asked Johnson whether he could be paid for salting, too, and Johnson said that he would ask Saunders and get back to Staley about this. Later, Johnson told Staley that "[Saunders] wants to see you get more charges and wants to see the charges that you do [sic] have filed"; Staley replied that it was Lawhorn's job to get them filed. Staley testified that if he felt that his rights had been violated by a contractor it was his job to present such information to Lawhorn; Lawhorn would

[30] That is, engaging in ULP litigation as a result of the instant complaint. Staley testified in this proceeding on February 16, 1996.

then evaluate the situation and determine whether or not unfair labor practice charges should be fired.

Staley testified that during his salting career he gave about five affidavits to the NLRB regarding salting situations. He was never told by union representatives not to tell the truth in the affidavits. Regarding monetary settlements as a result of unfair labor practice charges, Staley testified that the salts kept the money and did not turn it over to the Union; further, they utilized the backpay checks to demonstrate to fellow members at the union hall that they were making money by salting, and in this manner attempted to enlist their support and recruit them as salters.

Peter Smith testified that he has salted abut seven jobs since August1994, when he began his salting activities. CLP was his first attempt at salting; he applied overtly, and was hired.

Smith testified to the method of purportedly engaging in concerted activity by solicitation of other known salts, sometimes in the presence of unsuspecting employees, so as to provide evidence that the salt's subsequent request for wages or benefits is indeed concerted. This customarily requires two or more salts on the job simultaneously: one covert salt, in the presence of other employees, pretends to be persuaded by the other salt's rhetoric that better wages and benefits are needed, and in this manner nonsuspecting employees will sometimes join with them. Then, one of the salts will approach the contractor and request wages or benefits on behalf of all the employees. On one such occasion Kaspar asked Smith, "Don't you think we should be earning more money out here?" Smith agreed that would be nice. In this manner, concerted activity begins, and the salt's subsequent request for such wages or benefits thereby becomes protected activity.

On one job that Kaspar and Smith were salting, Kaspar spoke with Smith and one or more other employees about forming an employee association in order to resolve purported safety problems and the lack of an afternoon break period. Smith asked Kaspar and another employee whether afternoon break periods wouldn't be a good idea, and they all agreed that it was a good idea. Thereupon, according to an affidavit given by Smith, three employees, including Smith and Kaspar, "decided to designate Mike Kaspar as our association representative and spokesperson." Kaspar, as designated spokesperson, asked management for breaks on behalf of the employees. On another day he asked management for safety belts because of the "extremely dangerous" makeshift ropes they were using, and later Smith gave some coins to an employee so that he could use the pay phone to report the matter to CALOSHA. Approximately 3 weeks later Smith put a union sticker on his hardhat and began passing out union literature. Four days after this, Smith and another salt approached a member of management and requested that all the employees be given a wage increase. The following day, Smith joined an unfair labor practice strike and engaged in picketing. Some 4 or 5 days later he faxed a letter requesting unconditional reinstatement and, even though none of the matters over which he was picketing had been resolved, Smith nevertheless went back to work because, as he testified, "[H]e needed the money." Then, apparently a few days after being reinstated, he asked management for night shift differential pay. Smith quit this job the next day, and began salting a different contractor about 5 days later.

On his first day, after working for this new contractor for about 2 hours, Smith began talking with another employee about receiving breaks. About a month later, he approached management and requested breaks; he also asked, on behalf of the other employees, that the employees be given blood tests because of lead on the jobsite. That same day or the following day, Smith asked a foreman for double-time pay. On another occasion he asked for health care benefits. The foreman denied all of his requests, and Smith asked permission to call the shop to talk to management regarding these matters. Smith was denied such permission, and was told that he should not be bringing up these matters during working time. Thereupon, Smith initiated an unfair labor practice strike, picketing for a half-hour. A week later, he made an unconditional offer to return to work, and was reinstated. About a week after that he went out on another unfair labor practice strike.

Smith testified that he has been paid supplemental compensation by the Union for his salting activities. He does not know if such salting activities have succeeded in organizing any contractor. He has salted five to seven jobs, and has received a total of about $1800 in settlement of unfair labor practice charges. It is his understanding that he had a right during working time to go talk to management about wages and working conditions and subjects of this nature, and the fact that work was not getting done during these occasions was something that he "didn't think about."

b. IBEW Local 46 (Seattle, Washington)

Dave Howell testified as to the problems with union applicants that arose in CLP's Seattle, Washington offices, consisting of two small suburban offices in Tukwila and Everett, Washington. He personally observed many of the incidents, and other incidents were reported to him by staff members. The problems were generated primarily by IBEW Local 46.

CLP has modest sized office space with small areas for orientations. Generally, individual applicants will apply alone. However, IBEW Local 46 members would typically show up in very large groups; they would wait and gather outside, enter as a group in an intimidating manner, and then would line up at the front desk and ask to fill out applications. During the orientation period they would ask many "pointed" questions which, according to Howell, were designed to be more a form of entrapment than a sincere request for information. Some would ask about age discrimination matters: for example, "I'm 62 years old, you obviously won't hire me." Others would portray total apathy and would keep their backs turned at all times, to the point of not even acknowledging the CLP personnel, and, unlike serious applicants for employment, they would not interact with the staff member presenting the orientation. According to Howell, "They weren't really interested in what we had to offer." Some would walk around the office trying to look at company documents, and would loiter in an obvious attempt to eavesdrop on telephone conversations. On one occasion, upon turning in their applications they did not depart, but gathered in the middle of the room and proceeded to have a very loud conversation, for the obvious benefit of CLP staff, about a woman who had been

who had been grossly mistreated on a job. It was perfectly obvious to Howell that these gentlemen were not truly seeking work; applicants for employment who are truly seeking work do not behave in this manner.[31]

Harold (Tres) Huber began working in the Seattle branches as a job coordinator in November 1993, and became assistant manager in August 1995. Working primarily at the Tukweila office, he also went to CLP's Everett office during the week to assist in recruiting workers. The first day he started at CLP he received training in nondiscrimination in the areas of age, race, union, religion, and gender. From time-to-time he has received other training on the importance of treating everyone equally, and being consistent when dealing with union and nonunion applicants.

Huber testified that January 1995 was the first time a large group of union electricians showed up together to apply for jobs with CLP. This was at the Everett office, and Huber conducted the orientation. There seemed to be two individuals in charge of the group, Robert Rondeau and Adrian Damish. They were the only ones who asked questions that day and their questions seemed to be pointed and hostile. Damish asked if CLP only hired young guys to do apprentice work and pointed to one of the group, Gene Fosdik, and said, "This guy isn't a young guy. Are you not going to hire him?" According to Huber, the usual applicant is a person who genuinely wants work and will attempt to ask pertinent questions and act in a cooperative manner. This was not the case with the group of union applicants.

Huber recalls the first time Brett Olson, business agent for IBEW Local 46, brought a group of union electricians into CLP's office during a scheduled orientation. This was on May 3, 1995. Olson was accompanied by a large group of 12 to 15 individuals. Other applicants were also present. Preston Michaels, a newer CLP staff member, had been scheduled give the orientation, but in view of the groups' behavior upon entering the office it was decided that Huber, a more experienced staff member, would give the orientation. According to Huber, Olson's group did not behave the way applicants normally behave. About one-half to two-thirds of them, after being given application forms, did not sit down and fill out their applications even though sufficient chairs had been set out to accommodate the unusually large group. Rather, they remained "just milling around the lobby area, not seeming to do anything." Olson was one of those just standing there in the middle of the lobby, and as Huber commenced the orientation he asked Olson if he was there to apply. Olson didn't answer, rather, he said he was "just here." Huber told him that he would need to sit down and fill out an application or to leave if he was not there to apply for work; and at that point Olson opted to fill out an application so that the would be permitted to remain for the duration of the orientation session.

According to Huber some members of the group were wearing union insignia, such as union hats and pins, and some were not. Olson, obviously the leader of the group, was the only one who asked any questions; this was unusual, as Huber generally gets questions from quite a few people during the course of an orientation session. According to Huber, Olson's questions were pointed and hostile, and were not intended as a genuine request for information regarding CLP's business or its hiring processes.[32] Olson asked whether as an employee of CLP he could organize other employees, and Huber responded that the application process was for the purpose of screening applicants for employment, and that when people are hired they were all treated the same way. Olson asked if Huber understood that all the people in his group were union, and Huber answered, no. Olson said, "Well, we all have union hats and jackets on."

According to Steve Schmele, one member of Olson's group, Olson asked a lot of questions in an attempt to "make some parallels with the union," and "was in [Huber's] face about the fact that we were there to organize," and that, "according to Schmele, was disruptive to [CLP's representatives]."

Huber denied Olson's contentions that he was rude to Olson or his group in any respect either on that day or any other day; nor, contrary to Olson's assertions, did he grab the application out of Olson's hand. Rather, Huber testified that he routinely makes it a point to treat every applicant with courtesy, consistency and politeness, and that he was particularly careful to refrain from any possible confrontation with union applicants, explaining that "especially with the union applicants that were coming in . . . they always put me on guard, made me feel unease like . . . they were trying to get me to do or say something that was not consistent with my normal way of behavior or doing things." Olson and his group were treated the same as all other applicants, whether union or nonunion. While an applicant's demonstrated attitude, according to both Howell and Huber, is part of the hiring process, Olson and the other applicants were not denied employment because of the attitude they displayed at the orientation sessions; rather, they were disqualified pursuant to other established CLP guidelines.

According to Huber, during times material herein the Seattle offices processed an average of between 1100 and 1300 applicants each year, and of these some 15 to 18 percent, or between 195–234 applicants, are customarily found acceptable for employment. The rules for processing applicants are never relaxed during busy times when the demand for construction employees is high; if applicants do not meet the guidelines, they are not hired regardless of the current demand for workers.

On another occasion, Olson accompanied another salt, Don Watters, to CLP's office. Watters, an IBEW business agent from Idaho, had applied covertly during CLP's aforementioned

[31] While it is the Respondent's position that the union members were there for ulterior motives rather than for getting a job, and that they are not employees within the meaning of the Act, nevertheless, according to Respondent's attorney, "It is not our contention that that led to the rejection of any of them."

[32] Business Representative Olson testified that one question he asked during the orientation session was whether he, as an employee, could accept a job with a CLP contractor after the CLP job was over. Huber does not remember Olson asking such a question but testified that if asked, he would have answered that CLP has contracts with all of its customers and the contracts specify that customers are not permitted to hire a CLP worker who has been dispatched to them within a year after the last dispatch date. If that does happen, according to Huber, CLP would never rehire that worker.

short-lived out-of-state recruitment program, and had been hired by CLP a week earlier. Watters was giving notice that he was going out on an unfair labor practice strike, supra, and Olson was there as his representative to witness this. On this occasion, CLP's Seattle manager, Dave Howell, asked Olson to leave as Watters was a CLP employee. Thus, Howell said that he "would be speaking directly with Mr. Watters," and not with his representative. Olson refused to leave, asserting that he was there regarding his May 3, 1995 application.[33] Howell said he would speak with Olson about his application at some later date, and again invited him to leave. Olson again refused to leave, demanding to know whether "he was being discriminated against." Finally, Howell stated that if Olson did not leave Howell would call the Tukwila police and have him removed for trespassing. Upon leaving, Olson exclaimed, "But, you'll be hearing from me."

c. IBEW Local 332 (San Jose)

After applying with CLP and being rejected for not meeting the 30-percent hiring guideline, paid IBEW Local 332 organizers, Mark Livingston and Salvador Ventura, at the instigation of Business Representative/Organizer Roy Stair, returned to CLP's San Jose office on February 26, 1996, for the purported purpose of obtaining information regarding their disqualification. Livingston testified that it was his belief that the answers to the questions he and Ventura wanted answered would be more forthcoming from CLP personnel if he videotaped the meeting. Business Representative Stair agreed, thinking this would be a good idea. Ventura, on the other hand, believed that CLP personnel might find this approach "a bit intimidating."

Thus, Livingston and Ventura purposefully went to CLP's office at about 1 p.m. on February 26, 1996, as they knew that this is the time the office had scheduled an orientation session for applicants. The orientation had begun when they walked in, and several other applicants were seated at the office table watching an introductory video. Livingston and Ventura strode into the center of the room, blocking the video being shown to the applicants, and Livingston, with the video camera on his shoulder, appeared to be videotaping the proceedings. However, according to Livingston, there was no videotape in the camera. Thus, it seems apparent that his purpose was to simply disrupt the orientation process and intimidate those present. The CLP staff member, Assistant Manager Dave Harper, attempted to treat them with courtesy. He asked them to leave and said that he would address their questions at a later time, and advised them that they were disrupting the orientation process with the other applicants. When they refused to leave, Harper repeated his request. They again refused. They were advised that the police were being called. Ventura replied, "Yeah, why don't you go do that. I'll wait right here"; Livingston retorted, "It's a free world. I can do what I want." However, shortly thereafter, Ventura asked Livingston to leave and he did so, waiting outside. Ventura, who remained in the office, accused CLP of discriminating against him because he was Mexican. Ultimately the police arrived and Ventura, too, was required to leave.

On receiving this report of their visit, Business Representative Stair encouraged the two to return to CLP's offices 2 days later, on February 28, 1996, during another orientation session, again purportedly to check the status of their applications. However, Stair admitted that this was not his only purpose in sending the two back to CLP, and testified that he was just as interested in "developing a case for the National Labor Relations Board charge" that he would be filing. Again, Livingston and Ventura interrupted the orientation process as there were several applicants present, and again they were asked to leave and did not do so. Instead they advised the CLP representatives that they wished to submit new applications. This request was refused by CLP personnel, and upon again being asked to leave, Ventura said, "We're not done by a long shot."

Regarding Local 332's salting strategies, Business Representative Stair's December 15, 1994 affidavit to the Board in a different matter, states as follows:

> I (the union) don't want our members to stay on non-union jobs working substandard wages unless they are having some success in organizing. At some point, usually within a few weeks, if the salt or salts has not had any success with organization, then I will pull them off the job and either put them on another job, salt job, or they would return to the union's out of work list (a salt does not lose his place on the list while he is working as a salt).
>
> Subsidies of up to $80 per day have been paid by Local 332 to its salts. This amount isn't given to all salts, but only to some because the amount of subsidy is determined on a case-by-case basis, depending on the wages paid and any other expenses the employee/salts has to pay (commute, parking, tolls, et cetera).

C. Analysis and Conclusions

1. Recapitulation

As found above, I have dismissed each and every alleged unfair labor practice involving Respondent Aztech and Respondent Fuji.

I have further dismissed each and every unfair labor practice involving Respondent CLP prior to November 8, 1994, the date of the implementation of the 30-percent rule, with two exceptions, namely, the provisional finding[34] that CLP has violated Section 8(a)(1) of the Act as a result of Manager Nezrab's statement to employee Vaughn Hedges that union literature was not permitted on CLP jobs, and that CLP has violated Section 8(a)(3) and (1) of the Act, whether by inadvertence or otherwise, by failing to refer employees Vaughn Hedges and Shawn Smith to jobs subsequent to November 25, 1992, as a result of their union activity on the Axtech job.

[33] However, Olson had been notified of his disqualification by letter dated May 5, 1995, just 2 days after he applied.

[34] That is, in the event the individuals involved are determined to be employees within the meaning of the Act.

2. CLP's 30-percent rule

a. Alleged discriminatory motivation

Commencing on November 8, 1994, CLP began implementing its newly established 30-percent rule. This rule effectively precludes the hiring of union members who customarily earn more than 30 percent above the wages paid by CLP for comparable work. It is alleged herein that the 30-percent rule was discriminatorily motivated for the purpose of automatically eliminating the hiring of union applicants; further, in the alternative, it is alleged that the rule is inherently destructive of certain rights protected by the Act, and is therefore unlawful even in the absence of any discriminatory motive.

The record shows that simultaneously with the implementation of the 30-percent rule, CLP also revised, tightened up, and began to more stringently enforce some of its other hiring guidelines which had been incrementally developed over the years and which had been in effect for some time. It is important to note that the complaint herein[35] does not allege that any CLP rule, other than the 30-percent rule, was discriminatorily motivated. In their briefs, however, the General Counsel and the Unions argue that CLP's tightening up and more stringent enforcement of other rules provides evidence that the 30-percent rule was discriminatorily motivated. I do not agree.

Extensive credible record evidence tracks the evolution of CLP's hiring rules. There is no contention that these rules were designed for other than legitimate reasons, namely, to enable CLP to screen applicants for employment as best it could in order to hire the most qualified and reliable work force consistent with its business needs. Thus, through each of the 10 or 12 years of its existence, and prior to its being targeted by the unions herein, CLP's hiring guidelines were reevaluated and modified as a result of continuous monitoring, coupled with critical observations, surveys and studies, so that CLP could best market its product, the supplying of temporary construction labor, to its customers. Indeed, the application of more stringent hiring guidelines admittedly made it increasingly difficult to hire employees, and even CLP's branch managers complained that the implementation of such rules was hampering their ability to recruit workers and fill customers' orders. Nevertheless, CLP management did not relax its rules, but rather continued to disqualify an ever-increasing percentage of applicants, so that currently only about 15 to 25 percent of the many thousands of applicants who apply each year are found acceptable for employment.

Further, it is clear that some of the hiring guidelines are designed to eliminate applicants who overstate their qualifications or otherwise give false information on their applications. Thus, many years of continuous past experience are required and many references are contacted; positive references are necessary, and marginally good references are insufficient. CLP has developed a computerized system of ferreting out bogus phone numbers so that it will not unknowingly hire applicants who, for a variety of reasons, may falsify their experience and references. One such reason, of course, is that covert union applicants do not want their union affiliation known. However, in hiding their past work history, they are also precluding a prospective employer from researching their competence and reliability; merely because they may be eligible to be dispatched to a contractor from a union's hiring hall does not necessarily mean that they meet CLP's standards. Thus, there are many legitimate reasons why CLP's insistence upon extensive, true, and correct information is an absolute prerequisite to employment eligibility.

I find without merit the arguments by the General Counsel and the Unions that such guidelines have been developed only in order to discern whether an applicant is affiliated with a union and to deny employment to such individuals. Indeed, it must be emphasized that although the General Counsel and the Unions were given extensive access to voluminous and detailed hiring records over an extended period of time there is no showing that CLP has demonstrated a proclivity or pattern of applying the guidelines any differently to union members than to any other applicants.

To be sure, a voluminous number of such applications have been provided by CLP to the General Counsel and to the Unions and have been carefully examined with attention to minute detail, and relatively few surface inconsistencies have been pointed out. In most instances, however, upon examination, it appears that CLP personnel processing the applications had a valid reason for making the determinations they did in the hiring process. In other instances, CLP personnel may have disqualified union applicants for seemingly innocuous mistakes, such as misstating past wages by more than $1. However, there is no showing that the same rules were not consistently applied to all applicants, whether union or nonunion. I find that the few alleged inconsistencies, if any, that may not be readily explainable are anecdotal in nature, and are not probative of a contrived attempt to treat union applicants differently. Rather, such anecdotal situations may be ascribed to the fact that a number of different CLP staff representatives process thousands of applications each year, and each application presents a different scenario vis-a-vis an applicant's background.

Similarly, the fact that on occasion CLP staff representatives have turned away union applicants, advising them to return on appropriate days when orientation sessions for their particular crafts are being conducted, is not evidence of a discriminatory motive. Abundant record evidence shows that orientations are customarily given for particular crafts on different days, and that this standardized procedure is applied to all applicants.

Nor is it significant that on occasion CLP staff representatives, upon reviewing the application and noting that the applicant's union affiliation is clearly indicated, may acknowledge this fact to the applicant. More often, however, the applicants themselves pointedly bring this fact to the staff representative's attention, apparently in order to elicit some response, hopefully negative, so that the applicant can support a claim of discrimination. In fact, on each occasion when applicants have mentioned their union affiliation, the CLP staff representative acknowledged this in a positive manner and frequently commented that the applicants' union apprenticeship training will be helpful in the application process and in evaluating them for jobs commensurate with their abilities. Moreover, upon being

[35] Any and all of the various consolidated complaints herein are encompassed by the term "[c]omplaint."

advised that, if hired, the applicant intends to organize the employees of nonunion contractors, CLP staff representatives universally state that this is no problem so long as such activities are confined to appropriate times and places. And finally, union members who have engaged in union activity on customers' jobs have continued to be referred out by CLP to subsequent jobs.

Moreover, there is abundant affirmative record testimony by CLP representatives, whom I credit, that they have always treated union applicants the same as all other applicants, and have in fact knowingly hired many workers who are union members. Further, CLP has found that, with certain exceptions noted above, such workers have proved to be quite satisfactory, and it has had no reluctance to permit them to temporarily leave CLP's employ and return at a later date, provided that they comply with CLP's notice requirements. The facts in the instant case verify CLP's contentions in this regard, and record evidence shows that known union members, prior to the advent of the 30-percent rule, have been evaluated, hired, and treated in the same manner as all other applicants.

It is also contended that CLP's practice of giving applicants false or misleading or ambiguous answers to their inquiries regarding the status of their applications is evidence of discriminatory intent. CLP has demonstrated by abundant record evidence that its reluctance to advise each applicant of the true reason for his or her rejection is designed for no other purpose than to conserve business time for other matters, and to minimize the possibility of awkward and perhaps volatile confrontations.[36] It is readily understandable that CLP, as would any employer, desires to protect the safety of its employees and would want to minimize the time spent performing unproductive work. It is therefore reasonable that sorry letters and telephonic explanations by CLP staff representatives have been rather general and noncommittal, although at a later point CLP did begin sending out sorry letters that succinctly articulated the rationale for disqualification under the 30-percent rule. But the fact that the applicant is not provided with the true reason, or even any reason, for his or her disqualification is not, under the circumstances, supportive of a discriminatory intent.

CLP has provided abundant detailed record evidence substantiating its reasons for preferring a permanent, regular work force insofar as is practicable in an industry where employment is necessarily intermittent and seasonal: it has found that its regular, long-term employees are satisfied with the wages CLP is willing to pay and with the benefits it is willing to offer, and they are therefore safer, more reliable, and more attuned to CLP's methodology, including an emphasis on customer satisfaction, than are formerly higher paid workers who are simply seeking stopgap employment. Thus, dissatisfaction and disappointment as a result of significantly lower wages and benefits is likely to be reflected in the worker's performance and, equally important, in the worker's attitude toward customers; the worker, according to CLP, is its representative on the job. Further, a larger, regular work force will lower future recruiting costs and, as CLP's Seattle Branch Manger Howell emphasized, will significantly decrease costs associated with unemployment compensation and workers' compensation claims as a result of more effective risk management.

Prior to the implementation of the 30-percent rule CLP did not disqualify applicants because of their prior wages, and only utilized prior wage information to discern employees' skill levels so as to determine the wages CLP would be willing to pay them. Nevertheless, their reliability for sustained employment was incorporated into the hiring process and, upon being hired, CLP made a concentrated effort to convince new employees of the benefits of steady, regular employment. In addition, they were offered attractive monetary incentives for safety and for longevity, in an effort to get them to rely upon CLP as their permanent or primary employer rather than as simply a temporary between job employment service. Such efforts have proven to be successful, and it was then McCune's decision that the next step in this progression would be the addition of the 30-percent rule.

It is further argued that CLP's discriminatory intent may be discerned from its refusal to relax or abandon the 30-percent rule in the face of written assurances from Seattle-based unions and union applicants that if hired, the employees would only organize during appropriate times and would give CLP appropriate notice prior to quitting a job; in other words, they would comply with CLP's notice requirements. Initially, it should be pointed out that prior union behavior, infra, has provided CLP with reasonable grounds to mistrust any representations that union representatives might make. Moreover, CLP is in the business of directly hiring individual applicants, and dealing with third parties/agents of applicants is not a part of its established hiring process. Further, the record evidence shows that one of CLP's fundamental policies is that of consistency: every situation is to be treated in a consistent manner on a company-wide basis, so as not to create procedural discrepancies that might be misinterpreted as discriminatory behavior; this applies not only to union-related matters, but to a variety of State and Federal labor-related laws. Lastly, according to CLP, the Unions' aforementioned assurances merely indicate that they do not understand the purpose of the 30-percent rule. Thus, the rule was established in order to acquire workers who were more likely to be retained as long-term employees, and unions' attempts to use CLP as an "appendage to their hiring halls" for referring out temporarily unemployed workers clashes with the very purpose of the rule.

Because the 30-percent rule makes sense, and on its surface appears to be consistent with CLP business purposes, it may be argued that the timing of the implementation of the rule, namely, after such time as CLP became aware that it was being targeted by IBEW Local 441 as an object of its salting campaign, constitutes evidence of a discriminatory motive. In other words, the fact that CLP did not establish such a rule at some earlier time now makes the rule suspect. CLP maintains, however, that the 30-percent rule is merely the next step in an evolutionary process, and that in fact the evidence shows that the rule was not precipitously instituted as a reaction to a greater level of union salting attempts, but was studied and carefully considered for a substantial length of time prior to its

[36] Witness the confrontations that various union salts instituted upon being advised of their disqualification for employment.

implementation; further, it has not been shown that CLP harbored union animus at any prior time. I agree.[37]

Next, it is contended that the statistical study and analysis by CEO/President McCune relies upon arbitrary and faulty premises, was unscientifically founded and, given McCune's statistical expertise, was sophomoric and incomplete as it did not incorporate many significant variables and was therefore of obvious questionable reliability; accordingly, it is contended that this makeshift study under the rubric of a formalized "statistical analysis" is evidence of discriminatory intent. As noted above, Professor Silberberg, an expert witness presented by the Unions herein, would apparently tend to agree with this characterization, while CLP's expert witness, Professor Hall, is highly supportive of McCune's analysis and the results obtained. Regarding this matter, McCune acknowledged that one result of the study, namely, that employees with the greater longevity tended to be those who had earned past wages lower than or comparable to CLP's wages, was a clearly obvious conclusion that could be drawn in the absence of such a study. The more significant purpose of the study, according to McCune, was to ascertain the best cutoff point for eliminating applicants who were accustomed to earning higher wages. Thus, in rebuttal to Professor Silberberg, McCune and Professor Hall appear to be maintaining that the breakpoint, which happens to fall at a wage level of about 30 percent, beyond which workers hired by CLP tended to remain for only relatively brief periods of time, is not dependent upon a simultaneous analysis of other variables, and that the study was valid and essential in identifying the most cost-effective breakpoint.

From the foregoing, and the record as a whole, I find that the General Counsel and the Union have not presented a prima facie case in support of the complaint allegation that the 30-percent rule was discriminatorily motivated, even though the rule gives preference to nonunion applicants. Thus, although the practical effect of the rule is to automatically disqualify union applicants from employment with CLP, there are certain valid, nondiscriminatory purposes justifying its legitimacy. Moreover, even if such a prima facie case has been presented, I conclude that CLP has presented extensive and reasonable evidence demonstrating that the rule was in furtherance of lawful business pursuits.

b. Inherently destructive nature of the rule

It is abundantly clear that the 30-percent rule absolutely prohibits the employment of any union-affiliated employees unless they have first worked for a nonunion contractor for some length of time. The length of time will vary, and is dependent upon the difference between union journeyman scale and the hourly wage that CLP pays for comparable employment. Thus, in southern California, where union scale is higher, the rule would seem to effectively preclude the employment of union applicants provided that they had relatively limited employment at union scale; in the Seattle area, where the disparity between union scale and comparable CLP wages is not as great, a union member would have to work for a nonunion contractor for a considerably shorter length of time.[38] However, the record reflects that since the implementation of the rule, in no instance has CLP found any union applicant qualified for employment except under very improbable and isolated circumstances: For example, a union applicant from another jurisdiction did so qualify in Seattle because his union wages in Idaho happened to fall within 30-percent window. But, as a practical matter, the rule operates as an automatic disqualifier of union applicants unless they first obtain employment with a nonunion contractor for some indeterminate length of time. This, in effect, creates a new category of employee, who, by virtue of union membership alone, is relegated to an inferior status in relation to nonunion employees.

Conversely, as pointed out in the briefs of the General Counsel and the Unions, nonunion employees, including employees of CLP, are given an equally clear message: "If you elect to become a union member and thereupon work for union wages, you may no longer be employable by CLP during times when you are low on the union's out of work list; thus, you must remain non-union in order to be assured that you have not jeopardized your right to future CLP employment by joining the union." In this regard, abundant record evidence demonstrates that union organizers commonly utilize as a recruiting technique the assurance to prospective union members that during slow periods they will be given permission to work for nonunion employers in order to supplement their incomes. Given CLP's 30-percent rule, this principle would be a hollow inducement, and prospective union members would clearly have grave misgivings about opting for union membership. While there are many other nonunion employers without such a rule, the prospective union members' worries would not be confined simply to weighing their prospects of future employment with CLP. Thus, as articulated by the Supreme Court in *Phelps Dodge*:[39]

[37] While I have found that a CLP representative, subsequent to November 1992, unlawfully refused to refer employees Vaughn Hedges and Shawn Smith to further jobs, and that a CLP manager told employee Vaughn Hughes that it was impermissible for him to distribute union literature on jobsites, nevertheless the true reason for Smith's disqualification is unknown, and indeed the manager told Hedges that despite his union activity he was eligible for referral to other jobs. I do not consider this isolated incident, which occurred 2 years prior to the establishment of the 30-percent rule, to be indicative of companywide discriminatory intent.

[38] It appears highly unlikely that as a practical matter a union member in southern California, where union scale is high, would qualify for employment under the applicable criteria. Thus, for example, given IBEW Local 441's current journeyman wage rate of $26.35 per hour and CLP's comparable wage rate of $17 per hour, it appears that a union member who had worked at union scale for about 7 months would be required to have worked for nonunion employers for about 5 months in order to become eligible under the rule as applied by CLP. However, in the Seattle area, where the difference between IBEW journeyman scale ($22.95 per hour) and CLP's wages for comparable experience ($17 per hour) is considerably less, it appears that in any given 12 months of employment the union member would qualify for employment within a shorter timeframe. What is clear, however, is the fact that no union member would qualify unless he first worked for some other nonunion contractor for some period of time.

[39] *Phelps Dodge Corp. v NLRB,* 313 U.S. 177, 183 (1941).

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

Further, the rule effectively impacts the ability of unions to place workers, including paid union organizers, on the jobs of nonunion employers for the purpose of organizing, a right consistently upheld by Board and Court precedent.[40] CLP is a large and growing employer, and its customers include many hundreds of nonunion contractors who, in turn, it may be assumed, typically would employ many thousands of nonunion employees. Accordingly, CLP's 30-percent rule denies unions an important avenue of access to these many potential union members. Thus, although designed specifically as a method for improving worker retention, the rule has important implications far beyond its intended limited purpose, and directly impacts many employees of nonunion employers throughout large geographic areas.

By promulgating and enforcing such a rule that announces, in effect, "union employees need not apply until after they have qualified by working for non-union contractors," the rule clearly establishes and then discriminates between classes of employees; moreover, as it discriminates against union applicants by giving preferential employment rights to nonunion applicants, it denies equal treatment to union members and is unlawful.[41] As such, it is clearly "inherently discriminatory" within the meaning of well-established court and Board precedent.[42] "Conduct inherently destructive of important employee rights is that which directly and unambiguously penalizes or deters protected activity."[43]

Having found that the rule is inherently destructive of fundamental rights of union and nonunion employees alike, and having also found that CLP has presented abundant evidence supporting a reasonable business justification for the rule, it is necessary to weigh these conflicting legitimate interests in order to ascertain whether the benefit of the rule upon CLP's business operations outweighs the detriment to the rights of employees.[44]

Initially, it is obvious that the rule is not essential to the successful operation of CLP's business, as the record shows that CLP has operated competitively and has grown considerably in a relatively brief period of time, and that it has enjoyed such growth prior to the enactment of the rule.

Also of significant importance is the fact that CLP's regular employees whom it considers to be "retained," are not necessarily permanent employees, but may come and go as jobs within and without CLP's organization become available; and they are not penalized, as are union members, for working for contractors other than CLP.

At best, assuming arguendo, the accuracy of CLP's retention statistics and the validity of its definition of "retention," it appears that application of the rule has resulted in a companywide increase in worker retention of between 3 and 6 percent during the initial 1-year period following the introduction of the rule.[45] Given the fact that CLP has expended considerable efforts through the years in developing its retention program, and that despite such efforts at least well over 60 percent of its workers continue to be "temporary," that is, are not considered to be "retained" within the statistical parameters utilized by CLP,[46] an increase in retention of between 3 and 6 percent seems rather nominal. It appears that the very nature of CLP's business, furnishing temporary workers to contractors for varying, indeterminate lengths of time, after which, due to the sporadic and highly seasonal nature of the construction industry, there may or may not be further work for any given employee, virtually mandates a work force that may reasonably be described as "temporary," despite CLP's best efforts to "retain" them.

Further, it is necessary to consider the purported benefits of the rule in the context of its admittedly negative aspects: Because the rule effectively excludes union applicants, CLP thereby necessarily expends more money and resources on advertising and the application process in order to hire the same

[40] *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995); *Sunland Construction Co,* 309 NLRB 1224 (1992).

[41] *Sierra Realty Corp.,* 317 NLRB 832, 834 (1995).

[42] *Phelps Dodge Corp.,* supra; *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967); *NLRB v. Erie Resistor Corp.,* 373 U.S. 221 (1973); *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983); *Honeywell, Inc.,* 318 NLRB 637 (1995). Cf. *Wireways, Inc.,* 309 NLRB 245 (1992); I consider the *Wireways* decision to be anomalous and lacking in any helpful analysis pertinent to the instant case.

[43] *NLRB v. Haberman Construction Co.,* 641 F.2d 351, 359 (5th Cir. 1981) (en banc).

[44] *Great Dane Trailers,* supra; *International Paper Co.,* 319 NLRB 1253, 1269 (1995), rev. 115 F.3d 1045 (D.C. Cir. 1997).

[45] There is a difference between the lower retention figures contained in CLP's 1996 annual branch performance analysis summary and Professor Hall's opinion that such figures should actually be somewhat higher. However, I am not at all convinced that this perceived increase, whether around 3 or 6 percent or somewhere in between, is entirely attributable to the implementation of the 30-percent rule. As Professor Silberberg pointed out, CLP's statistical analysis is suspect as it does not factor in a number of important variables; thus, a considerable portion of the alleged increase in retention may well be attributable to the simultaneous tightening up of other hiring procedures, to more intensive staff training, or to the general improvement in the economic condition of the construction industry on the West Coast, rather than to the rule itself. I am confident, however, that CLP, having not undertaken a subsequent study of the impact of the rule upon retention, is in no position to *know* the degree to which, if any, the rule has increased retention. While it does not necessarily follow that there is a causal relationship between the introduction of the rule and increased retention, as a matter of logic this seems to be a reasonable assumption.

[46] The statistical parameters of "retention" in McCune's study and the statistical parameters of "retention" as embodied in CLP's annual branch performance analysis summary are different. Moreover, it is important to note that the term "retention" herein is not to be given its customary dictionary meaning. In CLP's parlance, retention does not necessarily mean that retained employees are necessarily regular, full-time employees. Rather, given the temporary nature of construction work, employees may be considered to be retained if they have worked a prescribed number of hours on and off for CLP over a given span of time, during which period they may have also worked for other employers.

number of employees; and further, as noted above, CLP has acknowledged that prior to the introduction of the 30-percent rule it was well satisfied with the union workers it hired, but that since the introduction of the rule it has effectively deprived itself of the services of such qualified employees. Finally, CLP has acknowledged that it has actually lost business as a result of being unable to obtain qualified employees, and has experimented with advertising and recruiting outside CLP's geographical areas; it had not done this prior to the rule's enactment.

The weighing of opposing interests is made difficult by the gaps in CLP's supporting evidence. Most importantly, there has been no subsequent statistical study by CLP designed to ascertain the actual degree of retention resulting from implementation of the rule; and, as noted, the modest increase in retention that has occurred may be significantly, or even entirely, attributable to other factors. Such a study would have be quite helpful to this analysis and, if favorable, would certainly have enhanced and supported CLP's articulated position. As CLP has not proffered any explanation for its failure to undertake such a study, it appears that this lack of supporting evidence must reflect adversely upon CLP's position.

Professor Hall, during his testimony, emphasized that he believed the rule not only enhanced CLP's retention rate, and thereby would, in the long run, result in increasing levels of profitability, but that it would increase CLP's net worth to a prospective purchaser. Professor Hall's analysis is based upon no more information than is contained in the instant record and therefore his opinion that the 3- to 6-percent increase in employee retention is attributable to the enactment of the rule, without support from a confirming study, appears to be premised more on faith than on foundation. Regarding any prospective increase in profitability and net worth, it is not unwarranted to attribute any such increases to the likely influx of nonunion customers who would willingly pay a premium for the services of "salt-free" employees. Indeed, CLP's representatives have testified to an increase in the absolute number of customers and in *customer retention* since the introduction of the rule, and whether this increase is mostly attributable to employee "retention," or to the certitude of a salt-free environment, or to a general upswing in the construction business is not able to be discerned from the record.

Accordingly, on the basis of the foregoing and the state of the record evidence, I find that the apparent benefit of the 30-percent rule upon the business operations of CLP is, in a word, indeterminate, because of CLP's failure to substantiate its position.[47] But, even giving CLP the benefit of the doubt and crediting the full 3- to 6-percent increase in retention to the enactment of the rule, I find that the benefit to CLP is incremental or "relatively slight" in relation to the clear, substantial, and pervasive harm to employee rights: increasing retention by 3 to 6 percent at the expense of virtually 100 percent of union applicants is hardly a fair rate of exchange. I therefore find that by implementing the 30-percent rule, CLP has violated and is violating Section 8(a)(3) and (1) of the Act.

[47] Thus, I conclude that CLP has not sustained its burden of proof under *Wright Line,* supra.

3. The Unions' salting campaigns

a. IBEW Local 441

The record evidence demonstrates that the salting program of IBEW Local 441 was initiated as a reaction to the influx of many nonunion electrical contractors who were severely undermining the wages and benefits that union members were accustomed to receiving, and who, in ever increasing numbers, were successfully making serious inroads into the share of the construction market that the Union had been enjoying. Accordingly, the number of union jobs was decreasing, the number of nonunion jobs was growing, and union workers found themselves on the Union's out-of-work list more frequently and for longer periods of time. As stated in one of the Union's newsletters, the proliferation of nonunion contractors and the erosion of union wages and work has evolved into "a battle for survival with the nonsignatory contractors."

The Union, in addition to a political and public-relations approach, has sought to fight this battle in a variety of ways. It has educated its membership through COMET classes; it has given its membership specific training in organizing strategies; it has attempted to organize nonunion contractors by the direct "top-down" approach, that is, solicitation of management representatives by union business agents in an attempt to sell them on the benefits of a ready supply of highly skilled electricians; and it has attempted to organize by infiltrating into the ranks of nonunion contractors, both overtly and covertly, in an effort to solicit employees to sign union authorization cards for purposes of supporting an election petition and/or in an effort to solicit employees to abandon their nonunion jobs and become union members.

It is this latter approach, commonly referred to as salting, that has become the nemesis of CLP and other nonunion employers, first because it is regarded as "sneaky" and carries with it an aura of deception and untrustworthiness, secondly because it is unsettling and time consuming, and third, because it has generated a virtual industry in expensive salting litigation that compels the expenditure of inordinate amounts of time and resources, erodes their profitability, and reduces or eliminates their competitive advantage over union contractors. Whether certain of the Union's salting tactics overstep the bounds of legitimate and acceptable organizing is an issue presented in this proceeding. CLP maintains that that is the case, and that union salts who employ such tactics are not employees within the meaning of the Act.

Generally, union members are not permitted to work for nonunion contractors without permission from their union representatives, and such permission carries along with it an obligation on the part of the union member to engage in salting. For the most part, union members can salt as much or as little as is within their comfort zone and, at a minimum, may merely respond to a business agent's questions about the wages they are receiving, the nature and length of the job, and other such matters. As they owe no allegiance to their nonunion employers, they may quit without notice at any time to take a union job, and, at the "suggestion" of their business agent, may falsely advise the contractor that they are engaging in an unfair labor practice strike; in this manner they may be able to pre-

serve a position with the nonunion employer when the union job terminates, as it is of course much less expensive and troublesome for the nonunion contractor to rehire the employee than to become embroiled in an unfair labor practice proceeding.

On the other extreme are paid union organizers who find salting to be an interesting and challenging occupation, and who have honed their salting skills by a combination of on-the-job training and tutorials from accomplished salting practitioners. These paid union organizers, together with such aspiring organizers, form a small cadre of individuals who, collectively, generate a large volume of NLRB charges against nonunion employers.

The tactics they routinely utilize are documented above in the section of this decision entitled "Organizing Strategies," and need not be reiterated here. Many of the strategies they employ may be characterized as confrontational, and go beyond the customary solicitation of fellow workers to join or assist the Union. It is necessary to examine the Union's motives in order to determine whether such tactics are undertaken for the legitimate purpose of "organizing," however broadly that term may be defined, or whether it is for purposes at odds with an employee's core responsibility to his or her employer, for example, to attempt to affect the profitability of the job and, perhaps, test the contractor's resolve or ability to remain in business.

It seems clear that the Union's "organizing" efforts have proved to be highly unsuccessful and that despite numerous and persistent attempts to "organize" over a period of some 5 years there have admittedly been a relatively few instances of positive results. Thus, according to the equivocal testimony of Business Representative Lawhorn, since 1992 there have been about 10 contractors that have signed contracts with the Union as a result of the Union's organizational activities; however, Lawhorn also testified that he "doesn't have an idea why these contractors on salted projects sign with Local 441." It is puzzling, therefore, that Lawhorn believes that the salting program has been successful.

It may be concluded as a result of articles contained in the Union's newsletter, "IBEW Four Forty One," written by business agents, that it measures its own organizing success in terms of the number of nonunion contractors who are no longer in business, and the number of unfair labor practices charges that have been generated. As noted in one issue:

> Through the efforts of those of you involved with the many programs we are using to combat the non-signatory contractors, 1993 was a success.
>
> 1993 saw the demise of some of the very largest non-signatory contractors. They are no longer in business, or no longer a force in our jurisdiction. If we add this to the medium and smaller non-signatory contractors who are no longer in business, we can be proud of the effort of this membership and its *organizing program*. [Emphasis added.)

Moreover, the Union prides itself for filing a prodigious number of unfair labor practice charges, indeed, more than any other IBEW local in the country. Thus, as noted above, a summer 1995 newsletter article entitled "Local 441 Stands Proud," states:

> It has been announced by International Representative Cecil Wynn that Local 441 leads all locals in the United States and Canada in filing unfair labor practices against non-signatory contractors. This is quite an achievement given the fact that 441 is nowhere near being one of the largest locals in the country and the difficult nature of roaming non-signatory contractors in at least five counties in Southern California.

From the foregoing, namely, the relatively insignificant number of new signatory contractors, juxtaposed with the Union's puzzling emphasis on the success of its salting program, it may be concluded that the Union measures its success not in the traditional sense of "organizing," but in the number of nonunion contractors it eliminates as competitors in its "battle for survival," as set forth above in still another newsletter.

While it seems clear from the foregoing evidence, coupled with the Union's organizing tactics as set forth above, that the salting activity of the paid union organizers is designed not for the traditional purpose of organizing but more importantly to eliminate nonunion contractors from the electrical job market, there is also in this proceeding more direct evidence of the Union's motives. Thus, as noted above, one former salt "insider" testified at length regarding the Union's salting strategies, namely, that the salts were taught to "ask for anything" in order to antagonize the foremen or owners of the Company, because, "We are not there to build their God-damn job";[48] rather, according to this witness, whom I credit, "it was more of a thing like, 'If we can't get the workers, bankrupt the contractors'"; and, as stated by Business Manager Saunders, "Well, we're out there to increase their costs of these jobs . . . to the contractors." Further, in order to merit reimbursement for such activities, in other words, to become a paid salt, it was necessary to prove one's ability by generating unfair labor practice charges. As noted above, some of the salts are quite competent in this endeavor.

Finally, I take official notice of the fact that the filing of unfair labor practice charges against contractors may initiate very expensive and time consuming litigation, and that, even in instances where the contractor is likely to prevail, the expenses of litigation may have a substantial impact upon a contractor's profitability and/or upon CLP's profitability. Thus, by utilizing the Board's processes as an adjunct to it efforts to "bankrupt the contractors," the Board becomes an unwitting accomplice to the Union's stratagem.

The Board in *Town & Country Electric*,[49] and *Sunland Construction Co.,*[50] companion cases with identical analyses of the issue, has found that paid union organizers, who may legiti-

[48] The Respondent in its brief emphasizes such language as being tantamount to an instruction to slow down the job or engage in sabotage. There is no evidence of such conduct, and it appears from other record evidence that salts are instructed to perform their work in a competent manner. I interpret the foregoing admonition to mean that salts are not to utilize their abilities or experience in a manner that would benefit the contractor by, for example, speeding up the job.

[49] 309 NLRB 1250 (1992).

[50] 309 NLRB 1224 (1992).

mately engage in an acceptable array of salting activities, are not "meaningfully distinguishable" from other employees and must be given the same work opportunities as any other employee. Accordingly, they are to be given an opportunity to demonstrate permissible on-the-job behavior. In so deciding, the Board stated that:

> In the absence of objective evidence, however, we will not infer a disabling conflict or presume that, if hired paid union organizers will engage in activities inimical to the employer's operations.

In addition to the fact that the conclusions reached herein regarding the Union's motives appear to be reasonably based and even compelled by the evidence presented by CLP, it is also highly significant that the Union has offered absolutely no rebuttal to such evidence. It has neither denied the accuracy of such evidence nor has it proffered an explanation for continuing a very expensive and time consuming salting campaign in the face of obviously unproductive results. The Union's business manager, Doug Saunders, did not testify in this proceeding, and the Union's business agent/organizer, Lawhorn, simply stated, without explanation, that he considered the Union's salting campaign to be successful. Accordingly, it appears that the Union is simply, in effect, demurring, and is therefore taking the position that the record evidence speaks for itself; and that, without offering a denial, explanation or rationale for its salting tactics discussed at length herein, such evidence is nevertheless insufficient to warrant the conclusion that a "disabling conflict" exists. I do not agree. Absent any explanation from the Union, the unrebutted exhortation, "If we can't get the workers, bankrupt the contractors," is entitled to be given its literal meaning.

While the parameters of what constitutes a "disabling conflict" have not been delimited, it would appear that the record contains abundant objective evidence clearly showing that the motive and purpose of IBEW Local 441's paid union organizers is to engage in activities inimical to the employers' operations. Given the state of the record herein, the on-the-job behavior of paid union organizers, if hired, may be readily presumed. Even though the work actually performed by the paid union organizers may be acceptable, it would appear that their activities in attempting to create confrontations with contractors for the purpose of generating unfair labor practice charges, whether ultimately meritorious or not, in furtherance of an objective to impact the contractors' financial viability, constitutes such a disabling conflict. Absent any Board precedent to the contrary, I find that such conduct constitutes a disabling conflict as envisioned by the Board in *Town & Country,* supra. Accordingly, I find that such paid union organizers are not employees within the meaning of Section 2(3) of the Act and are not therefore entitled to the Act's protection.

Having found that the Union's paid organizers are not employees within the meaning of the Act, it is clear that a contractor does not violate the Act by refusing to employ them. It is also clear, as noted above, that many members of the Union do not engage in other than more conventional organizing activities such as, for example, distributing union literature, and that some are not at all concerned with organizing but rather are merely seeking to supplement their incomes with temporary employment until a union job becomes available. The dilemma presents itself as follows: How is a contractor to distinguish between the legitimate applicant and the paid union organizer? It appears that as this is a dilemma that the Union has created, CLP should not be placed in the position of having to resolve it during the application process and should be entitled to automatically exclude all members of the Union from further consideration, as any one of them could be a paid union organizer, or an aspiring paid union organizer, with the intention of becoming an employee for purposes found herein to be impermissible. As this matter has not been sufficiently addressed on the record, it is reserved for consideration during the compliance stage of this proceeding.

b. The other unions in Northern California and the Seattle area

CLP maintains that the other unions herein, having "collaborated" with IBEW Local 441 in targeting CLP, should also be held accountable as accomplices in Local 441's unprotected salting campaign and, similarly, should be denied the protection of the Act. The fact that the other unions have collaborated with Local 441 does not necessarily mean that they have participated in or adopted the same salting stratagem. Indeed, it appears that some of the unions have attempted to distance themselves from such activities. Further, the limited record evidence indicates that each local union is autonomous, and that, in comparison with Local 441, each has engaged in salting to a much lesser extent.

This does not mean that the unions have not adopted salting techniques that are intentionally disruptive of CLP's business operations. Rather, I find this to be the case. Thus, they have entered CLP's offices in large groups; they have attempted to videotape the hiring process and have refused to leave when asked; they have been uncooperative and have attempted to eavesdrop on telephone conversations of CLP personnel and to read documents that are clearly private; and have engaged in other such activities. In this regard, I credit the testimony of each of CLP's representatives, who exhibited the utmost restraint and professionalism in dealing with the various attempts of the unions to intimidate them, and find their accounts of the various incidents to be entirely accurate.

While this does not necessarily demonstrate that such applicants, if hired, would engage in confrontational salting activities for purposes incompatible with their duties as employees, it does raise serious questions in this regard. Thus, the conduct of certain of the unions clearly demonstrated that their union members were not serious applicants for employment as they behaved in a manner that would cause any reasonable prospective employer to disqualify them for employment for legitimate business considerations. More particularly, their behavior was clearly incompatible with what CLP expected of its applicants, as amply and credibly described by CLP's representatives and, regardless of the content of their applications, in and of itself was a legitimate basis for disqualification.

However, CLP elected not to disqualify them on this basis and, rather, relies upon the deficiencies reflected in their applications and/or their lack of eligibility pursuant to the 30-percent rule, and, further, upon their "collaboration" with IBEW Local

441 in furtherance of objectives unprotected by the Act. Unlike members of IBEW Local 441, these applicants submitted letters to CLP attesting to their intention to engage in union activities only during appropriate times and to otherwise comply with CLP's rules. Further, the record evidence regarding the past salting activities of such unions is insufficient to prove that their salting campaigns are designed for purposes other than organizing. Thus, insofar as this record shows, the comparative infrequency of their salting activities after becoming employed has resulted in relatively few unfair labor practice charges, and there is only limited record testimony describing such activities. Nor, unlike the foregoing evidence regarding IBEW Local 441, is there any evidence gleaned from newsletters or direct testimony of salts or former salts demonstrating that the true motive of such salting activities was for purposes incompatible with their status as employees. Accordingly, with regard to the remaining unions, I conclude that CLP has not met its burden of proof by demonstrating a disabling conflict that would deprive such union members of the protection of the Act.

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent, Contractors Labor Pool (CLP), has violated Section 8(a)(1) and (3) of the Act by implementing a discriminatory hiring rule effectively precluding the employment of union members.

4. Respondent CLP has not engaged in other violations of the Act, as alleged.

5. The Respondent, Aztech Electric, has not engaged in violations of the Act, as alleged.

6. The Respondent, Fuji Electric, has not engaged in violations of the Act, as alleged.

THE REMEDY

Having found that the Respondent CLP has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. Moreover, CLP shall be required to post an appropriate notice, attached hereto as "Appendix."

Having found that CLP has implemented a discriminatory rule, known as the 30-percent rule, effectively precluding the consideration of union members for employment, it shall be required to rescind the rule vis-a-vis all union applicants who are employees within the meaning of the Act, and to consider their applications for employment regardless of their prior union wages. Further, having found that by applying such a rule CLP has denied employment opportunities to union members, it shall be required to reevaluate the applications of those union members who have been disqualified on the basis of the 30-percent rule, and, with regard to those applicants who would have otherwise been hired and referred to jobs, to make them whole for any loss of earnings and other benefits, less any net interim earnings. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 181 (1987).

However, as it has been found that applicants for employment who are paid union organizers for IBEW Local 441 are not employees within the meaning of the Act, and that CLP is in no position to know which of the applicants are, and which are not, paid union organizers, it appears that the formulation of an appropriate remedy under such circumstances pertaining to the employability of any and all members of IBEW Local 441, and any backpay to which they may otherwise be entitled, would best be relegated to the compliance stage of this proceeding. Similarly, by the same reasoning, as Vaughn Hedges and Shawn Smith are members of IBEW Local 441, any reinstatement rights and any backpay to which they may be entitled is also relegated to the compliance stage of this proceeding. Finally, as the coerciveness of any statement made by CLP to Vaughn Hedges is dependent upon his status as an employee, this matter is also relegated to the compliance stage of this proceeding.

[Recommended Order omitted from publication.]